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No. 869

In the United States Court of Appeals
For the Seventh Circuit

No. 12090

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

NICHOLAS GUIDO,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable Michael L. Igoe, Trial Judge.

APPENDIX.

U. S. C. A.-7
FILED
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CLERK

RICHARD E. GORMAN,
JOSEPH E. GREEN,
One North LaSalle Street,
Chicago, Illinois,
Attorneys for Defendant-Appellant.

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APPENDIX.

1

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA
vs. } No. 56 CR 62
NICHOLAS GUIDO

PREFIX TO RECORD ON APPEAL

Pursuant to the provisions of Rule 12(c) of the Rules of the United States Court of Appeals for the Seventh Circuit, the following statement is submitted:

1. The captioned case commenced with the filing of an indictment in the District Court on January 31, 1956;

2. Defendant filed appearance bond in the amount of $15,000 in the District Court February 1, 1956;

3. Defendant's plea of not guilty was entered March 20, 1956;

4. Trial commenced before the Honorable Michael L. Igoe April 25, 1957;

5. Verdict of guilty returned by jury May 2, 1957;

6. Defendant committed to custody of Attorney General for a period of five (5) years May 13, 1957;

7. Defendant admitted to bond on appeal in the sum of $15,000 May 13, 1957;

2 8. Defendant filed notice of appeal May 21, 1957.

/s/ Joseph E. Green
Joseph E. Green
/s/ Richard E. Gorman
Richard E. Gorman
Attorneys for Defendant,
Nicholas Guido

One North LaSalle Street
Chicago 2, Illinois
CEntral 6-7722

3 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of May, being the 6th day thereof, in the Year of Our Lord One Thousand Nine Hundred Fifty-Seven and of the Independence of the United States of America, the 181st Year.

Present:

Honorable John P. Barnes,	Chief District Judge
Honorable William H. Holly,	District Judge
Honorable Philip L. Sullivan,	District Judge
Honorable Michael L. Igoe,	District Judge
Honorable William J. Campbell,	District Judge
Honorable Walter J. La Buy,	District Judge
Honorable J. Sam Perry,	District Judge
Honorable Win G. Knoch,	District Judge
Honorable Julius J. Hoffman,	District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Monday, May 13, 1957

Court met pursuant to adjournment

Present: Honorable Michael L. Igoe, Trial Judge.

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

The January 1956 grand jury charges:

That on or about November 4, 1955, at Maywood, Illinois, in the Northern District of Illinois, Eastern Division,

Nicholas Guido,

defendant, together with other persons unknown to the grand jury, did, by force, violence and intimidation, feloniously take from the presence of the employees of a bank, to wit, the Maywood-Proviso State Bank, 411 Madison Street, Maywood, Illinois, a bank the deposits of which were then and there insured by the Federal Deposit Insurance Corporation, a sum of money, to wit, approximately $21,906.82, which money was then and there in the care, custody, control, management and possession of the aforesaid Maywood-Proviso State Bank.

The January 1956 grand jury further charges that in committing the offense above described, the defendant did put in jeopardy the lives of the employees and customers of the Maywood-Proviso State Bank by the use of a dangerous weapon, to wit, a firearm: all in violation of Section 2113, Title 18, United States Code.

A True Bill.

/s/ Ernest W. Landgrebe,
Foreman.

R. Tieken,
United States Attorney.
FJMcG:hma

5

No. 56 CR 62

United States District Court
Northern District of Illinois
Eastern Division

The United States of America
vs.
Nicholas Guido

INDICTMENT

Vio: Section 2113, Title 18, United States Code.
(Bank robbery.)

A true bill,
Ernest W. Landgrebe,
Foreman.

Filed in open court this 31st
day of January, A. D. 1956
Roy H. Johnson
Clerk.

Bail, $.....

Judge Igoe
Criminal Calendar

6

In the United States District Court

• • (Caption—No. 56 CR 62) • •
(Filed Jun 13 1956)

Tuesday, March 20, 1956

Present: Honorable Michael L. Igoe, District Judge

This day comes the United States by the United States Attorney comes also the defendant Nicholas Guido in his own proper person and by his counsel and being arraigned upon the Indictment filed herein against him pleads not guilty thereto and it is

Ordered that this cause be and the same is hereby set for trial on May 16, 1956

7

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 CR 62) * *

MOTION TO QUASH SEARCH WARRANT AND TO SUPPRESS EVIDENCE AND FOR THE RETURN OF PROPERTY

Comes now your petitioner, Nicholas Guido, otherwise known as Don Schiavone, and respectfully represents unto this Honorable Court:

1. That he is one of the defendants named in the above numbered indictment now pending for trial in this Court.

2. That he is not guilty of the matter and things charged in the indictment herein.

3. That on, to-wit, the 19th day of January, 1956 and for a considerable period of time prior thereto, he was the lessee of a certain safety deposit vault known as Safety Deposit Box No. 6728 which he had rented in the name of Don Schiavone from the Pioneer Trust & Savings Bank at 4000 West North Avenue in the City of Chicago, Illinois; that in the said safety deposit box
8 so rented by him, the said Nicholas Guido, otherwise known as Don Schiavone, there were therein located Federal Reserve Notes in the number, denomination and aggregate amount as follows:

No.	Denomination	Amount
14	$100 Federal Reserve Notes	$1,400
24	$ 50 Federal Reserve Notes	1,200
20	$ 20 Federal Reserve Notes	400
15	$ 10 Federal Reserve Notes	150
	Total Amount	$3,150

4. That the said currency of the United States, more particularly described in the paragraph last preceding, was then and now is the true and lawful property of your petitioner, Nicholas Guido, otherwise known as Don Schiavone.

5. That on, to-wit, January 19, 1956, there was presented to the Honorable Michael L. Igoe, one of the Judges of the United States District Court for the Northern District of Illinois, Eastern Division, a certain affidavit for search warrant signed and sworn to by one Roswell T. Spencer, a Special Agent for the Federal Bureau of Investigation in Chicago, Illinois, which said affidavit sought the issuance of a search warrant to search the said Safety Deposit Box No. 6728 so rented by your petitioner and to seize the property to be found therein; that there is appended hereto and marked Exhibit "1" a true and correct copy of the said affidavit for search warrant which is incorporated herein for all purposes as if herein at large recited; that upon presentation to the said Honorable Michael L. Igoe, Judge of the United States District Court as aforesaid, the said Court did thereupon on, to-wit, the said 19th day of January, 1956, issue and deliver to the said Roswell T. Spencer, a certain search warrant; that there is appended hereto and marked Exhibit "2" a true and correct copy of said search warrant which is incorporated herein for all purposes as if herein at large recited.

6. That possessed of and acting under the pretended authority of said search warrant the said Roswell T. Spencer together with divers other Agents of the Federal Bureau of Investigation, the exact number and identities of whom are to your petitioner unknown, did on, to-wit, the said 19th day of January, 1956 at the hour of approximately 11:00 o'clock in the morning thereof enter into and search the said safety deposit box so leased by

your petitioner under the name of Don Schiavone and did take therefrom the said currency of the United States more particularly described in paragraph 3 preceding, all of which money was and is the true and lawful property of your petitioner.

7. That the currency of the United States so seized and removed from your petitioner's lock box, as aforesaid, has continuously since the said seizure and removal thereof and until the present time been held and retained and is now being held and retained in the custody of the Federal Bureau of Investigation in Chicago, Illinois, with the intent that the same be produced at the trial of the above captioned indictment and used as evidence therein against your petitioner.

8. That the said search warrant is totally void and of no effect and that the search and seizure conducted thereunder, as hereinabove set forth, was wrongful, illegal and violative of the rights of your petitioner under the IV and V Amendments of the Constitution of the United States and of the provisions and requirements of Rule 41 of the Federal Rules of Criminal Procedure because the affidavit upon which the same was issued is insufficient on its face and failed to establish probable cause for believing the existence of the grounds on which the said warrant was issued in that the facts charged and alleged in the said affidavit are hearsay to the affiant and affirmatively appear to be other than on the affiant's personal knowledge, the said affidavit stating that "information derived from an informer" is the source of the facts alleged therein upon which the reason to believe that property stolen in violation of the laws of the United States was concealed in the said bank safety deposit box.

Wherefore, your petitioner prays that the said search warrant be by order of this Court quashed,

set aside and declared for naught, and that the property seized hereunder, as hereinbefore alleged, be suppressed as evidence and the same be ordered returned to your petitioner, and that the use of same in evidence or for any purpose whatever in the trial of the indictment herein be denied to the United States of America, and that this Court order that no advantage be taken of the fruits and findings obtained by the United States of America by means of the illegal search conducted as aforesaid by the means herein complained of.

/s/ Nicholas Guido
Nicholas Guido, otherwise
known as Don Schiavone

State of Illinois }
County of Cook } ss.

Nicholas Guido, being first duly sworn, upon his oath deposes and says that he is the defendant in the above captioned cause and is the petitioner herein whose name is subscribed to the above and foregoing motion to quash search warrant and to suppress evidence and for the return of property; that he has read the said motion by him subscribed and knows the contents thereof and that the same are true.

/s/ Nicholas Guido
Nicholas Guido

Subscribed and sworn to before me,
....., this 13th day of
June, 1956.
Edward H. White, Jr.
Deputy Clerk.

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EXHIBIT "1"

UNITED STATES DISTRICT COURT
For the
Northern District of Illinois, Eastern Division

(Filed Jan 19, 1956)

Docket No. .....
Case No. .....

United States of America

v

Safety Deposit Box No. 6728, Safety Deposit Vault, Pioneer Trust & Savings Bank, 4000 West North Avenue, Chicago, Illinois

Affidavit for Search Warrant

Before U. S. District Court Judge Michael L. Igoe
Name of U. S. District Judge

Chicago, Illinois
Address of U. S. District Judge

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as (Safety Deposit Box No. 6728 in the name of Don Schiavone, Safety Deposit Vault, Pioneer Trust & Savings Bank, 4000 West North Avenue, Chicago, Illinois, in the Northern District of Illinois, there is now being concealed certain property, namely currency of the United
here describe property
States, which is the proceeds of the robbery of the
here give alleged grounds for search and seizure
Maywood-Proviso State Bank, 411 Madison Avenue, Maywood, Illinois, robbed November 4, 1955.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: That Don Schiavone (also known as Nicholas Guido, has

been identified as possessing and passing currency stolen from said bank and that information derived from an informer is that the proceeds of above bank robbery are in said Safety Deposit Box; further, a box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido

/s/ Roswell T. Spencer
Signature of Affiant.
Special Agent FBI Chicago
Official Title, if any.

Sworn to before me, and subscribed in my presence, January 19, 1956.

/s/ Igoe
Michael L. Igoe,
United States District Judge

---

1. The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

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EXHIBIT "2"

UNITED STATES DISTRICT COURT
For the
Northern District of Illinois, Eastern Division

Docket No. .....
Case No. .....

United States of America

v

Safety Deposit Box No. 6728, Safety Deposit Vault, Pioneer Trust & Savings Bank, 4000 West North Avenue, Chicago, Illinois } Search Warrant

To Roswell T. Spencer, Special Agent, Federal Bureau of Investigation, or any other Special Agent of the Federal Bureau of Investigation:

Affidavit having been made before me by Roswell T. Spencer that he (has reason to believe) that (on the premises known as) Safety Deposit Box No. 6728 in the name of Don Schiavone, Safety Deposit Vault, Pioneer Trust & Savings Bank, 4000 West North Avenue, Chicago, Illinois, in the Northern District of Illinois, there is now being concealed certain property, namely currency of the here describe property United States which is the proceeds of the robbery of the here give alleged grounds for search and seizure Maywood-Proviso State Bank, 411 Madison Avenue, Maywood, Illinois, robbed November 4, 1955, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, serving this warrant and making the search (at any time in the day or night[1]) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 19th day of January, 1956.

/s/ Igoe
Michael L. Igoe
United States District Judge

---

1. The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

14

RETURN
(Filed Jan 23 1956)

I received the attached search warrant 1/19, 1956, and have executed it as follows:

On 1/19, 1956 at 10:53 o'clock A. M., I searched (the person) described in the warrant and
(the premises)

I left a copy of the warrant with R. H. Lovett, Pres. name of person searched or owner or "at the place of search"
Pioneer Trust & Savings Bank 4000 W North Ave Chicago Ill together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

No.	Denomination	Amount
14	$100. Federal Reserve Notes	$1,400.00
24	$50. " " "	1,200.00
20	$20. Federal Reserve Notes	400.00
15	$10. " " "	150.00
		$3,150.00

This inventory was made in the presence of Robert K. Linden, Ast. Trust Officer Pioneer Trust & Savings Bk Chicago Leo E. Petdrotty Special Agent FBI Chicago, Ill and William B Hunter, Special Agent FBI Chicago Ill.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Roswell T Spencer

Subscribed and sworn to and returned before me this 23rd day of January, 1956.

/s/ Igoe
Michael L. Igoe
United States District Judge

15

United States of America
Northern District of Illinois } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Affidavit for Search Warrant filed January 19, 1956; and Search Warrant, with Marshal's Return thereon, filed January 23, 1956, in the case of: United States of America —vs.— Safety Deposit Box No. 6728, Safety Deposit Vault, Pioneer Trust & Savings Bank, 4000 West North Avenue, Chicago, Illinois, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 9th day of May, A. D. 1956.

Roy H. Johnson

Clerk.

By Eleanor B. Davis

Deputy Clerk.

(Seal)

16

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 CR 62) * *

ANSWER TO MOTION TO QUASH SEARCH WARRANT AND TO SUPPRESS EVIDENCE

(Filed Jul 12 1956)

Comes now the United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, and respectfully represents to this Honorable Court:

1. That the Government concurs in considerable part with the statement of facts in petitioner's motion. The property described therein was seized by agents of the Federal Bureau of Investigation under the authority of the search warrant referred to therein and the property is currently held by the Government for possible use of evidence in the trial of the above captioned cause.

2. That the property was seized under and by authority of a valid and proper search warrant and the search and seizure transpiring thereunder were legal, valid and not violative of defendant's rights under the Constitution and laws of the United States.

Wherefore, the United States respectfully urges this Honorable Court to deny defendant's motion to quash

the search warrant, suppress the evidence and return the property seized.

/s/ R. Tieken
R. Tieken
United States Attorney for the
Northern District of Illinois.

FJMcG: meh

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

Friday, July 20, 1956

Present: Honorable Michael L. Igoe, District Judge

On defendant's motion to quash the search warrant, suppress the evidence, and return the sum of $3,150.00 seized on the search of a state deposit box belonging to defendant at the Pioneer Trust and Savings Bank at Chicago, together with briefs, the Court finds the facts and circumstances set forth in the affidavit are legally sufficient to support the issuance of the warrant, and, accordingly, defendant's motion is hereby denied.

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

Monday, April 29, 1957

Present: Honorable Michael L. Igoe, District Judge

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant in his own proper person and by his counsel and the defendant by his counsel moves orally for a mis-trial and evidence is introduced and arguments heard and now come the

Jury and Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause and the Judy are interrogated and said motion is overruled and the trial proceeds and during the hearing of further evidence on behalf of the Government the hour of adjournment having arrived it is

Ordered that the Jury and Alternate Jurors be permitted to separate until April 30, 1957

19

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

Tuesday, April 30, 1957

Present: Honorable Michael L. Igoe, District Judge

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant in his own proper person and by his counsel and the Jury and Alternate Jurors heretofore elected, empaneled and sworn herein also come and trial of this cause proceeds and during the hearing of further evidence for the Government the defendant by his counsel moves to suppress certain articles seized as a result of a search made on January 17, 1956 and the Court having heard the arguments of counsel and being fully advised said motion is overruled and the trial proceeds and at the close of the Government's case the defendant by his counsel moves for a directed verdict of not guilty and the Court having heard the arguments of counsel and being fully advised said motion is overruled and the hour of adjournment having arrived it is

Ordered that the Jury and Alternate Jurors be permitted to separate until May 1, 1957.

1 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 CR 62) * *

TRANSCRIPT OF PROCEEDINGS
(Filed Jun 26, 1957)

had in the above-entitled case, taken before the Hon. Michael L. Igoe, one of the Judges of said Court, without a jury, in his court room in the United States Court House at Chicago, Illinois, commencing on Thursday, April 25, 1957, at the hour of 10:00 o'clock a. m.

Appearances:

Hon. Robert Tieken,
United States District Attorney, by
Mr. Frank McGarr and
Mr. Harold Sodergren,
Assistant United States District Attorneys,
representing the plaintiff;

Mr. Richard E. Gorman and
Mr. Joseph E. Green,
representing the defendant.

2 The Clerk: 56 CR 62. United States v. Guido. For trial.

(Thereupon a panel of twelve veniremen were examined on their voir dire and sworn to try the issues in the above-entitled cause. One additional venireman was examined on his voir dire and sworn to serve as an alternate.)

(Whereupon were all the proceedings had and taken in the above-entitled cause until 2:00 o'clock of the same day.)

3 IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C CR 62) • •

Before Judge Igoe and a Jury,
Thursday, April 25, 1957,
2:00 o'clock p.m.

Trial resumed pursuant to recess.

Present:

Same as before.

And thereupon the following further proceedings were had herein, in the presence and hearing of the jury:

4 The Clerk: Case on trial.

The Court: You may proceed.

And Thereupon Mr. McGarr Addressed the Jury in Opening Statement on Behalf of the Government, as Follows:

Mr. McGarr: Ladies and gentlemen of the jury, the practice is that counsel for the Government and the defense make a brief statement known as opening statements for the purpose of giving a brief outline of what the case is all about, so as the individual events are brought to your attention you will know where they fit into the total picture.

I know you realize that nothing I say or the defense counsel says is evidence or is to be taken as true by you, but it is for the purpose of merely outlining the case.

The Government's evidence will prove substantially the following, and I might say that you will very quickly notice this is a very simple case. There is nothing complicated or complex about it and it should be easy to keep the facts in mind.

5 On November 4, 1955, at about 6:20 in the evening an armed robbery occurred at the Maywood Proviso State Bank in Maywood, Illinois. The robbers who en-

tered the bank had hoods over their heads. Therefore, no witness will be able to physically identify any particular man as one of the men who was in the bank at that particular time.

But at least one of the hooded men in the bank left behind him certain physical evidence, the use of which and by which his presence in the bank can be definitely established. The Government will present that evidence to you.

Among the moneys or currency taken from the bank was some identifiable currency. There were two packets of $2 bills, each containing 25 bills, and the serial numbers of which had been recorded by the bank.

There were also among the currency taken from the bank some $50 bills which can be identified as money which was in the bank at that time and taken from the bank.

Two months later, or slightly more than two months later, on January 14, 1956, a man spent five $2 bills in a Sears Roebuck store at North Avenue and Harlem. That man, the Government's evidence will indicate, was Nicholas Guido, and those five $2 bills were among the $2 bills which were stolen from the Maywood Proviso Bank two months previous.

On January 19, 1956, just a few days after spending this money in the Sears Roebuck store a safety deposit box in the Pioneer Bank rented under the name of Don Schiavone was located and opened, and found therein was more money identifiable as money which had been stolen from the Maywood Proviso Bank.

The Government will prove, or the witnesses will testify, and the evidence will show that Don Schiavone, who rented that box, was the defendant Nicholas Guido, and that the contents of that box in the bank were his. That is really all there is to the case. As I said, it is not complicated and it will not be difficult to follow.

The Court: Do you gentlemen want to make a statement?

Mr. Green: A very brief one, your Honor.

7 The Court: All right, proceed.

And Thereupon Mr. Green Addressed the Jury in Opening Statement on Behalf of the Defendant, as Follows:

Mr. Green: If the Court please, Mr. McGarr, ladies and gentlemen of the jury, it is customary in the opening of any case for the counsel for the prosecution and counsel for the defense to say a few words on what the case is the best we can, and what we believe the evidence is going to show.

Now, what has been said by Mr. McGarr, and such few words I have to say, is not to be regarded as evidence of any kind. The evidence is the proof that you will hear from the witness stand, and as you receive the instructions from Judge Igoe.

In brief, we intend to establish—although the burden is not upon us to do—but we intend to establish that on the day of the robbery of this bank the defendant Nicholas Guido was elsewhere.

We intend to establish that in part by the docu-

8 mentary evidence which will establish his presence during that day as being elsewhere, and by the testimony of other witnesses who were in his presence at that time.

We intend to account, if need be, for any money which was found at any time in the possession of Nicholas Guido.

In brief, if called upon we propose to introduce evidence to that effect, and upon that we will expect and ask for your verdict of not guilty.

Thank you.

The Court: Swear the witnesses.

Are there witnesses here?

Mr. Green: There is an order excluding witnesses, your Honor?

The Court: I understand. We don't know who they are. You folks will have to police that.

Mr. McGarr: There are none in the court room now, your Honor.

The Court: All right.

Mr. McGarr: I am sorry but I should have mentioned this earlier. May the Government be allowed to retain
9 Agent Hunter, who will probably testify?

The Court: Yes, sir.

Mr. McGarr: We will call Mr. Jiachini.

The Clerk: Raise your right hand and be sworn, please.

Mr. Peter Jiachini: Yes, sir.

And Thereupon the Government, to Maintain the Issues in Its Behalf, Offered and Introduced the Following Evidence, to Wit:

PETER JIACHINI, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. Will you state your name, please?

A. My name is Peter Jiachini.

Q. What is your business or occupation?

A. I am in the banking business, sir.

Q. With what bank are you now associated?

10 A. The Maywood Proviso State Bank.

Q. In what capacity?

A. President.

Q. Calling your attention, Mr. Jiachini, to November 4, 1955, were you connected with the Maywood Proviso Bank on that date?

A. I was.

Q. What was your duty, title or capacity then?

A. Vice president.

Q. On that day, November 4, 1955, was the Maywood Proviso State Bank covered by or involved in the Federal Deposit Insurance Corporation system?

A. It was.

Q. Had the bank been issued a certified by the Federal Deposit Corporation?

A. Yes, sir.

Q. Do you have that certificate with you?

A. I do, yes, sir.

Mr. McGarr: I would like to ask leave of the court to substitute a photostatic copy of this in lieu of the original.

Mr. Green: No objection.

The Court: It may be marked and received in evi-
11 dence, and the photostat may be substituted in lieu of the original.

(Said document, so offered and received in evidence, was marked Government's Exhibit 1, a photostatic copy being substituted in lieu of the original.)

By Mr. McGarr:

Q. I will show you this document that has been marked for identification as Government's Exhibit 1 and ask you if that is a photostatic copy, or a photograph of the Federal Deposit Insurance Corporation certificate of the Maywood Proviso State Bank?

By the Witness:

A. It is.

Q. What is the effective date of that certificate?

A. January 7, 1954.

Q. Is that Federal Deposit Insurance coverage still in effect at the present time?

A. It is still in effect, yes, sir.

Q. Was it in effect on November 4, 1955?

12 A. It was.

Q. Calling your attention again, Mr. Jiachini, to

November 4, 1955, were you present in the bank on that day?

A. I was.

Q. Did anything unusual occur in the bank on that day?

A. Yes.

Q. Will you describe, first, about what time did this occurrence take place?

A. We are open on Friday nights. This was on a Friday. At about 6:22 that evening I heard scuffling of feet, noise, in the lobby of the bank. It was more than one normally hears.

I heard a voice saying, "Trick or treat." That is what I heard, sir.

Q. Where were you located at that time with relation to the lobby?

A. I was in an office without a top to it, although there were partitions here, but the top was completely free.

Q. Could you see over the partition?

A. I could not.

Q. Did you see anything that occurred in the 13 bank?

A. No, sir, nothing whatsoever.

Q. Did you remain that office after you heard this disturbance or occurrence?

A. No. When I heard the disturbance I got up and I pressed the burglary alarm.

Q. How long did you remain in this partitioned office after you pressed the alarm?

A. For 35 seconds.

Q. When you came out of that office, into what part of the bank did you go?

A. I came into the bank lobby, and I was able to see then people and employes, and what was in the bank.

Q. Will you tell us what you saw in the bank when you came into the lobby?

A. There was a lady, a customer, on the floor crying. There was a child walking about the floor. There were a few customers who were in the lobby. There were a few dollar bills on the floor and on the counter there were—I can't tell you the number but there were a number of bullets on the counter.

Q. Expended bullets?

14 A. No. There had been no shots.

Q. Did you or the employes under your supervision ascertain whether the bank had suffered any monetary loss?

A. Yes.

Q. Was the amount of that loss ascertained?

A. We, at first at that moment made a guess of about $22,000. Shortly thereafter we made an exact count and determined the exact loss. The exact loss was $21,906.82.

Q. Prior to November of 1955 did the Maywood Proviso State Bank make a practice of recording serial numbers of any money that was in the cashiers' cages?

A. Yes, sir, we did.

Q. Will you describe just what you did?

A. We had a practice of having fifty $2 bills in two different packages, old bills with recorded numbers.

Q. Did the bank have to your knowledge a record of the serial numbers of any of the money that was taken on November 4, 1955?

A. It did.

Q. And what types of bills were recorded at that

15 time?

A. $2 bills.

Q. Was it as you have described, in two different cages?

A. I can't say that, but it was in two different packages.

Q. You had the record of the serial numbers of the two packages of $2 bills?

A. That is correct.

Q. Where is the Maywood Proviso State Bank located?

A. 411 Madison Street, Maywood, Illinois.

Q. That is the Maywood which is immediately adjacent to Chicago, a suburb of Chicago?

A. It is just west of Forest Park. It is one of the west suburbs of Chicago.

Mr. McGarr: No further questions.

Cross Examination by Mr. Green.

Q. By the time you came out of your partitioned office the robbery had been completed, is that correct?

By the Witness:

A. That is correct.

16 Q. And you personally didn't see any of the men, or the man who was robbing the bank?

A. Not at all. That is correct.

Q. And you estimate it was 35 seconds after you heard someone shout "Trick or treat" that you came out of your office?

A. Yes.

I should better say that I estimate that the robbers took 35 seconds. And the reason I estimate that, sir—

Q. Yes, I would like to know?

A. Because the next day I timed the motions I went through and it turned out to be 35 seconds. It was a very fast job.

Q. You say there was twenty-one thousand odd dollars taken in the robbery?

A. That is correct. It was $21,906.82. It was in a drawer, mostly.

Q. One single drawer, you say?

A. Two drawers.

Q. You are certain there were $2 bills?

A. That is correct.

Q. The bank had a record of the serial numbers of those $2 bills?

17 A. That is correct.

Q. The bank did not have a record of the serial numbers of the other money?

A. That is correct.

Q. It was only the $2 bills which were recorded?

A. That is correct.

Q. The balance of the money that was taken was currency of various denominations?

A. That is correct, sir, and some change that happened to be in the drawer.

Mr. Green: That is all.

Mr. McGarr: No further questions.

The Court: That is all, thank you.

The Witness: Yes, sir.

(Witness excused.)

Mr. McGarr: We will call Mr. Tellefsen.

The Clerk: Raise your right hand and be sworn, please.

Mr. Edward A. Tellefsen: Yes, sir.

(Witness duly sworn.)

18 EDWARD A. TELLEFSEN, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. Will you state your name, please?

By the Witness:

A. Edward A. Tellefsen.

The Reporter: Will you spell your last name, please.

The Witness: T-e-l-l-e-f-s-e-n.

By Mr. McGarr:

Q. Your business or occupation, sir?

By the Witness:

A. Banker. I work in a bank.

Q. In what bank are you now located?

A. Drovers National.

Q. On November 4, 1955, did you work in a bank?

A. Yes, sir. The Maywood-Proviso State Bank.

Q. Where is that located?

A. 411 West Madison Street, Maywood, Illinois.

Q. Did the Maywood-Proviso State Bank at about that time have evening hours on Friday?

19 A. They did.

Q. Calling your attention to Friday, November 4, 1955, were you at work in the bank on that evening?

A. I was.

Q. Did anything unusual happen at that bank on that evening?

A. Yes, sir.

Around about 6:20 three men came into the bank.

Q. Where were you in the bank when these three men came in?

A. Sitting at my desk.

Q. Where was your desk with relation to the entrance to the bank?

A. Northeast of the entrance.

Q. From your desk can you see the entrance?

A. I can.

Q. Is there any obstruction between you and the entrance?

A. No.

Q. Will you relate what you saw occurred as these

three men came in? And if you will, please, describe the men to the best of your ability.

20 A. That is one thing I could never do, describe the men.

Q. Well, describe how they looked to you when they came in?

A. Well, when they came in, I didn't see them until someone hollered, "Tricks or treat." That is when I glanced over into the middle of the lobby and I seen the three men. Two were starting for the cage, and one fellow called me over; brought me out into the lobby.

Q. Could you see their faces?

A. I couldn't. They had hoods on their faces.

Q. Will you describe what you mean by hoods?

A. They had a sort of a royal blue hood, something like a stocking cap over their heads with the eyes cut out.

Q. Were these men, if you know, or if you could see, carrying anything?

A. Well, I said, the two that went toward the cage, I didn't see what happened or what they were carrying, but the one fellow called me out. He had a machine gun, or which I thought was a machine gun, at least.

Q. When he called you out, what if anything did

21 he say to you?

A. He told me to come out from behind my desk; come out into the lobby and get down.

I asked him, "How?"

And he said, "Just get down."

So, I dropped to my knees.

Q. Did you see, or could you see what the other two men were doing?

A. Not at that time, no.

Q. Did you see the other two men again at any time thereafter?

A. Yes. As they ran out of the bank, the fellow with the machine gun dropped back and let the other two fellows run out ahead of him, and then he went out last, he backed up.

Q. As they ran out of the bank, did they pass near where you were kneeling?

A. They passed right by me.

Q. Did you see, or could you see what if anything they were carrying at that time?

A. All I could see was one of them carried a tray that we have in one of our cash drawers.

Q. At any time while the other two men were in
22 the bank did you see either of them carrying a gun?

A. No, I didn't.

Q. Do you know whether they did or did not have a gun?

A. No, I couldn't swear to it.

Q. What was your title or position in the Maywood-Proviso State Bank at that time?

A. Cashier.

Q. Cashier of the bank?

A. Yes.

Q. Did you assist or cause to be made an audit of the loss at the bank?

A. I made the audit at the bank with the assistance of my assistant and a couple of policemen that were still there.

Q. Did you determine the amount of that loss?

A. I don't know the exact amount now.

Q. Will you tell us if you recall approximately what it was?

A. I would say, between $21,000 and $22,000, if I remember it correctly.

Q. Did the bank at that time while you were the cashier

make a practice of recording the serial numbers of any of the currency in the bank?

23 A. We did. We did on the $2 bills in three of the cages.

Mr. McGarr: I would like to have this marked as Government's Exhibit 2 for identification.

(Said document was thereupon marked Government's Exhibit 2 for identification.)

By Mr. McGarr:

Q. I show you a document that has been marked for identification as Government's Exhibit 2 and ask you if you have ever seen that before?

By the Witness:

A. Yes, sir.

Q. In whose handwriting is the entry or the markings on that sheet of paper?

A. That is my writing. My signature is on it.

Q. Is that a record of the serial numbers of certain bills which were present in the bank on the day of the robbery?

A. That is right.

Q. Were the packets of bills whose numbers are shown there taken in the course of the robbery by the robbers?

24 A. Yes, sir.

Q. Are you the person who ascertained these serial numbers and recorded them on that sheet of paper?

A. I am.

Q. After these bills had their numbers recorded where, if you recall, were they placed?

A. They were placed in each one of the teller's cash drawers.

Q. What were the denominations of these bills?

A. $2 bills. There were 25 $2 bills placed in each one of the cages, the three cages.

Q. Did you see the robbers, or could you see them after they left the entrance of the bank?

A. After they left the entrance of the bank?

Q. After they left and went outside could you still see them?

A. No.

Q. You don't know then whether they drove away or not?

A. No. All I know is that some woman come running in and told us that—

Mr. Green: I object to that.

The Court: Objection sustained.

25 Mr. McGarr: No further questions.

Mr. McGarr: First, your Honor, at this time I would like to offer into evidence Government's Exhibits 1 and 2. 1 being the FDI certificate, and 2 the memorandum which the witness has just identified as to the serial numbers of the bills.

Mr. Green: There will be no objection to receiving No. 1.

As to No. 2, we would like to examine the witness on this.

The Court: 1 may be received.

(Said document was offered and received in evidence as Government's Exhibit 1.)

The Court: Now you are going to talk about No. 2.

Mr. Green: Yes, sir.

26 *Cross Examination by Mr. Green.*

Q. I will show you this document that has been marked as Government's Exhibit 2 for identification and ask you whether that is in your handwriting?

By the Witness:

A. That is right.

Q. Now, evidently this refers to certain $2 bills bearing various numbers, some of which were in the payer's cage of the bank?

A. That is right.

Q. And some were in the receiver's cage of the bank, is that right?

A. That is right.

Q. And in the payer's cage were $2 bills Nos. E-22764051A to 75A, is that correct?

A. That is correct.

Q. And the same as for the bills in the receiver's cage?

A. That is correct.

Q. What is the reason for your signature being there?

A. Because I had put it there.

27 Q. When had you put that signature there?

A. When I first put the bills in the cage.

Q. And when was that, please? On the date this bears?

A. That is right.

Q. In other words, these bills were in the receiver's cage from April 19, 1955 on?

A. That is correct.

Q. After the occurrence of the robbery, which occurred on the 4th of November, 1955, you were told that the bills had gone?

A. I was not told. I looked for them.

Q. Where did you look?

A. In the cash drawers.

Q. In the drawers?

A. Yes.

Q. Both the payer's cage and the receiver's cage, is that so?

A. That is correct.

Q. And the $2 bills were missing from both?

A. That is right.

Q. Immediately prior to that time, when was the last time you checked on the fact of whether or not the $2 bills were there?

28 A. Oh, I would say, probably two or three weeks before that. We used to audit the payer's and receiver's, spot audit them occasionally. I would say it was just about two or three weeks previous to that.

Q. And you saw the bills two or three weeks previously but you did not see them after the robbery?

A. That is right.

Q. And therefore you conclude they were taken during the robbery, is that so?

A. I didn't say they were taken.

Q. You don't know when they were taken?

A. Well, they were in the cage.

Q. Two weeks before?

A. That is right.

Q. They were not in the cage after that?

A. That is right.

Q. You were not in the payer's cage? That was not your capacity at that time?

A. No, sir.

Q. Nor the receiver's cage?

A. No.

Q. Now, you say three men came into the bank?

29 A. That is correct.

Q. And one had what you thought to be a machine gun?

A. That is correct.

Q. You didn't notice whether the other two were armed or not?

A. No, sir.

Q. And all wore similar stocking caps, did they?

A. As far as I could see, with the little chance that I had to see it, the best I could see it.

Mr. Green: Nothing further.

Mr. McGarr: That will be all.

The Court: The witness is excused.

(Witness excused.)

Mr. McGarr: I move for the admission of Government's Exhibit 2 at this time, your Honor.

Mr. Green: Your Honor, I don't think there has been any technical foundation laid for 2 as yet. This witness, if I can summarize his testimony, said that he prepared this exhibit on or about the date it bears, sometime in April, 1955; that he would periodically check the cages— I
30 don't think he went so far as to say that, but he did two or three weeks prior to the robbery, and he observed these bills in the payer's cage and the receiver's cage, where he was not in charge. That was an observation by him, that he had checked the cages after this occurrence and they were not there. But I don't think it lays a foundation for the admission of Government's Exhibit 2.

The Court: What does that have to do with the exhibit, whether he checked them or not?

All he testified to is that on the date shown on that piece of paper he made those notations.

Mr. McGarr: They may relate to the weight of the evidence, but I doubt the other.

The Court: They may be admitted. You may argue whether it weighs very much or not, but as far as it goes I think it is admissible.

31 (Said document, so offered and received in evidence, was marked Government's Exhibit 2.)

Mr. McGarr: We will call Mr. Haggerty.

The Clerk: Will you raise your right hand and be sworn, please.

(Witness duly sworn.)

JOSEPH A. HAGGERTY, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. State your name?

By the Witness:

A. Joseph A. Haggerty.

Q. What is your business or occupation, Mr. Haggerty?

A. I am employed by the Ford Motor Company at 7401 South Cicero.

Q. In November, 1955, what was your occupation?

32 A. I was Special Agent for the Federal Bureau of Investigation.

Q. To what office were you assigned?

A. Chicago, Illinois.

Q. In the course of your duties at or about that time as Special Agent for the Bureau, were you assigned to the investigation of the Maywood-Proviso robbery?

A. Yes, sir.

Q. Did you visit the bank?

A. Yes.

Q. On what date was that?

A. November 4, 1955.

Q. Do you recall about what time you arrived?

A. Just a few minutes before 7:00 p.m.

Q. Would you describe what you did when you arrived at the bank?

A. When I arrived at the bank I inquired as to the area where the money had been taken.

Mr. Green: I object to that, your Honor, as to the inquiry he made.

The Court: Yes. Whatever conversation you had there, of course, that is objectionable. He can say what he did.

33 By the Witness:

A. (Continuing) I examined the west side of the bank, coming from the door on the left-hand side. There were four cages there, as I recall. I conducted a preliminary examination of all four cages.

I observed some mud on the counter, inside the cage of the first cage from Madison Avenue, as you come in through the door. It was on the edge of the counter, on the inside edge of the counter.

In Cage 3 I observed a heel print on top of the counter.

By Mr. McGarr:

Q. What was the texture or composition of that counter, if you recall?

By the Witness:

A. The counter is what appeared to be a marble counter of mixed colors, a kind of wavy colored effect.

Q. What else if anything did you do?

A. I scraped the mud off the edge of the counter in Cage 1 and put it in a small box.

Mr. McGarr: I would like to have these marked as

34 Government's Exhibits 3 and 4 for identification.

(Said boxes were respectively marked Government's Exhibits 3 and 4 for identification.)

By Mr. McGarr:

Q. I show you, Mr. Haggerty, a small box covered with a glassine tape material marked for identification Government's Exhibit 3, and will ask you if you recall seeing that before?

By the Witness:

A. Yes. This is the box that I placed the mud in, and my handwriting appears on the outside of the box.

Q. Is it by means of that handwriting you are able to identify the box?

A. Yes.

Q. After you collected this mud as you described, what else if anything did you do?

A. I received a package of film from two other Agents, and brought that back to the office, together with that box.

Q. I show you a package labeled, "Kodak Super XX Film Pack," marked for identification as Govern-
35 ment's Exhibit 4, and ask you if you recall seeing that?

A. Yes. This is the box which I received from the other two Agents.

Q. Do you recall the names of the Agents from whom you received it?

A. Yes, sir. O'Shea and Sheehan.

Q. Referring to the film pack, government's Exhibit 4 for identification, and a small white box, government's Exhibit 3 for identification, what did you do with these after the activities you have just described?

A. I subsequently sent them to the FBI laboratory in Washington.

Q. By what means were they sent?

A. By registered mail.

Mr. McGarr: No further questions.

The Court: Is that all?

Mr. McGarr: Yes, sir.

36 *Cross Examination by Mr. Green.*

Q. Were other Agents present at the Maywood-Proviso State Bank at the time you arrived?

By The Witness:

A. Not at the time of my arrival.

Q. You were the first one there?

A. Yes, sir.

Q. At the first cage, when you were at the bank, you noticed some mud on the counter?

A. On the edge of the counter.

Q. Will you describe that counter?

A. Pardon?

Q. Will you describe that counter?

A. The counter has a small partition separating it from the bank and, as I recall, from the next cage. This was located somewhat close to the second cage on the inside edge of the counter.

Q. Was this a clod of mud or just some loose dirt, or how would you describe it?

A. The mud was attached to the edge of the counter, the inside edge. It was adhered to the edge for a distance of about an inch and a half.

37 Q. It was on the vertical portion of the edge of the counter, is that right?

A. It was right on the edge.

Q. On the vertical portion, not on top?

A. It was right on the edge.

Q. On the side?

A. Some was on the top and some was on the vertical side.

Q. Was that dry at that time or was that moist?

A. It was moist.

Q. It was not a clot at all, I mean, it was still porous when you saw it, this mud?

A. What do you mean by a clot?

Q. It was not hard? It was still retaining moisture, and still in a pliable form, is that correct?

A. It had some moisture, and it was somewhat pliable. It was not dry, and it was not real wet.

Q. You scraped it all up at once and put it in a box, the box which I hold in my hand marked as Government's Exhibit 3?

A. That is correct.

Q. This box contains all of the mud that you obtained at that time?

38 A. That is correct.

Q. When you went down to Cage No. 3, I take it that was further down the west side of the interior of the bank?

A. The third one from the door, yes, sir.

Q. There was a marble counter there of mixed colors, I think you told us?

A. As I recall.

Q. And there was a heel print there?

A. Yes.

Q. I take it you called the attention of some other Agent to that heel print, is that so?

A. As I recall it, they called it to my attention.

Q. When did these other Agents arrive?

A. Pardon?

Q. When did the other Agents arrive?

A. Oh, I would say, thirty or forty-five minutes after I did.

Q. You were alone in the bank then for about a half to three-quarters of an hour as the only Agent?

A. I was the only Agent there, yes, sir.

Q. Now, a photograph was made of that heel print,

39 I assume?

A. Yes.

Q. And the negatives I have in my hand, Exhibit 4, Government's Exhibit 4, is that so?

A. That is right.

Q. Was there any mud found on Cage 3?

A. No.

Q. Were any heel prints found in or about the bank similar to the heel prints that were photographed in Government's Exhibit 4?

A. I found a piece of paper on the floor. I think it was in Cage 2, as I recall.

Q. A piece of paper?

A. A piece of loose paper on the floor.

Q. Bearing such a heel print?

A. It had what appeared to be a heel print but it could not be clearly distinguished.

Q. Where is that paper now?

A. I think it is in the files of the FBI.

Mr. Green (addressing Mr. McGarr): You are not offering these now?

Mr. McGarr: No.

Mr. Green: That is all of this witness.

40 *Redirect Examination by Mr. McGarr.*

Q. You said this mud or dirt was on the edge of the counter. Are you referring to the edge of the counter on the outside, the lobby side, or the edge of the counter on the inside of the teller's cage?

By The Witness:

A. On the inside of the cage.

Q. And the same with relation to the heel print, that I understand was on the top of the counter?

A. That is right.

Q. Was that toward the lobby side of the bank, or toward the teller's side of the counter?

A. That, as I recall, was located almost in the middle of the entire counter which extended from the lobby to the working side of the cage.

Q. Approximately how wide is that counter?

A. I would say it is about 2½ feet wide.

Mr. McGarr: No further questions.

The Court: That is all, Mr. Haggerty.

The Witness: Thank you.

(Witness excused.)

Mr. McGarr: We will call Mr. Sheehan.

41 The Clerk: Will you raise your right hand and be sworn.

(Witness duly sworn.)

JAMES ROBERT SHEEHAN, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. Will you state your name, please?

By The Witness:

A. James Robert Sheehan.

Q. Your business or occupation, sir?

A. I am a Special Agent with the Federal Bureau of Investigation, assigned to the Chicago office.

Q. At what office were you assigned in November, 1955?

A. The Chicago office of the FBI.

Q. On or about that date did you participate in an investigation of a bank robbery at the Maywood-Proviso Bank?

A. I did.

42 Q. Did you go to the bank?

A. Yes, I did.

Q. Do you remember about what time you arrived?

A. I arrived there approximately 7:30 p.m.

Q. Were there any other Agents of the FBI there when you arrived, if you recall?

A. Agent Haggerty was there. I was one of the first to arrive there.

Q. When you arrived, will you tell us, please, what you did?

A. Well, I assisted in looking around the inside of the bank for any clews that the bank robbers might have left behind.

Mr. Green: I object to that, if your Honor please.

The Court: That may go out.

By Mr. McGarr:

Q. Mr. Sheehan, just indicate what you did when you arrived?

By The Witness:

A. I dusted with fingerprint powder, and while dusting I noticed what appeared to be a heel print on the inside counter of one of the teller's cages, and I took eleven
43 photographs of this heel print. I turned the film pack over to Agent Haggerty.

Q. When you say on the inside counter of one of the teller's cages, will you describe that a little more precisely, please?

A. From the entrance of the bank it would be the third cage north on the west side of the bank.

Q. Was it within the two side walls of the teller's cage?

A. It was.

Q. How big, if you recall, was the opening in the face of the teller's cage that led out to the lobby of the bank?

A. Oh, I would say about that size (indicating).

Q. You are indicating how many feet, or how many inches?

A. As I recall, about three feet.

Q. And how high, if you recall, was the opening?

A. Well, the counter was at least above waist level.

Q. And the opening in the cage above the level of the

counter, how high was the opening, if you recall?

44 A. As I recall, from the counter on up to the ceiling it was open.

Q. In other words, there were no bars or anything separating the teller from the public?

A. No, not that I can recall.

Q. I show you, Mr. Sheehan, a film pack that has been marked for identification as Government's Exhibit 4, and I will ask you to examine it and its contents.

Have you ever seen this before?

A. Yes, sir. These negatives have my initials on them. These are the negatives of the photos which I took of that particular print.

Q. What did you do with the negatives, if anything, after they were made?

A. You mean, after these were processed?

Q. Yes?

A. These were forwarded to the FBI laboratory.

Q. Did you do that?

A. No, I gave these to Agent Haggerty.

Mr. McGarr: No further questions.

45 *Cross Examination.*

Mr. McGarr: Subject to cross examination I would like to introduce at this time film pack marked Government's Exhibit 4 for identification.

Mr. Gorman: May we cross examine first?

The Court: Yes.

By Mr. Gorman:

Q. Mr. Sheehan, you said that as a part of this investigation which you made at the bank you were dusting for finger prints?

By The Witness:

A. Yes. Well, I said we were dusting with finger print powder.

Q. And on one of the counters in the process of this dusting you found a heel mark?

A. I noticed a mark which appeared to be a heel mark, yes.

Q. You were the first one to notice that?

A. Yes, sir, I was.

Q. After you noticed it, what did you do, if anything?

46 A. I drew it to the attention of Agent Haggerty, who was in charge of the particular case.

Q. And then what did you do?

A. Then I took a—he suggested that I photograph this heel print, and I took a fingerprint camera and placed it on top of the mark and made a number of photographs.

Q. How many photographs did you make at that time?

A. Eleven. That is a full pack. One less than a full pack. There are twelve shots in a pack, and one of them I over-exposed.

Q. After you took the pictures, what did you do?

A. I took the film pack and I presented it to Agent Haggerty.

Q. That is you took the roll of film from the camera?

A. Yes.

Q. And you gave it to Agent Haggerty?

A. That is right.

Q. When did you next see that?

A. I saw it on this date. It was marked in evidence.

47 Q. I beg your pardon.

A. I said I saw it on this date, that I know of.

Q. Did you see it at any other time since then?

A. No, I haven't.

Q. Your initials and the date appear on these films, do they not?

A. Yes.

Q. And when were those placed on there?

A. At the time I took the photo of the print, and I had a little piece of paper alongside when I took the photos. The fingerprint camera covers—the opening of the fingerprint camera covers the entire print. It makes a ratio of one to one. The actual film there is the same size as that which I took.

Q. In other words, you didn't put your initial on the film, you took a picture of your initial, is that right?

A. Yes. I put my initial on a sheet of paper and I placed that alongside of the print, the heel print.

Q. Did you photograph anything else at the scene, at the bank that evening?

A. No, I didn't.

48 Mr. Gorman: No further questions, your Honor.

The Court: Do you offer that?

Mr. McGarr: I do offer that, your Honor, and at the same time I am going to offer into evidence Government's Exhibit 3, being a box of dirt. I realize that it has not been connected with the defendant.

The Court: It may be admitted subject to your promise to connect it up.

Mr. Gorman: That is our objection at this time, your Honor.

The Court: Yes.

Mr. McGarr: These boxes will be both connected up.

The Court: If they are not connected they will go out.

Mr. McGarr: Thank you.

They are Government's Exhibits 3 and 4.

(Said exhibits, so offered and received in evidence subject to the foregoing, were respectively marked

49 Government's Exhibits 3 and 4.)

The Court: Is that all of this witness?

Mr. McGarr: Yes, sir.

(Witness excused.)

The Court: Call your next witness.

Mr. McGarr: We will call Miss Herrs.

The Clerk: Will you raise your right hand and be sworn.

(Witness duly sworn.)

LILLIAN HERRS, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. Will you state your name, please?

By the Witness:

A. Miss Lillian Herrs.

Q. Is that Miss or Mrs.?

A. Miss.

Q. What is your business or occupation?

A. I am the head cashier at Sears Roebuck and Company.

Q. In which store?

A. 1601 North Harlem Avenue.

Q. Is that generally known as the North and Harlem store?

A. That is right.

Q. Were you the head cashier at this Sears store on January 14, 1956?

A. Yes, sir.

Q. Calling your attention to that day, January 14, 1956, a Saturday, do you recall whether you were working on that day?

A. Yes, sir.

Q. On that date, if you know, were there any $2 bills taken in exchange for merchandise by the Sears store?

A. Yes, sir.

Q. How many, if you know?

A. Seven.

Q. Did you ultimately receive these bills?

A. I received them, yes, sir.

Q. When you received them, what did you do with them?

51 A. Well, we had a list of serial numbers and—

Mr. Green: I object to that, if your Honor please.

Mr. McGarr: I don't think the answer is objectionable, your Honor.

The Court: What is the objection?

Mr. Green: The witness is going to undertake to not only tell what she did with them, but she is undertaking to tell us about some bulletin, I gather that was in her possession.

The Court: What is wrong about that?

Mr. Green: I think there is a great deal, your Honor, because evidently the $2 bills were circularized and generalized or bulletinized. I don't want to be bound by what the bulletin may have stated.

I think that is correct, isn't it?

Mr. McGarr: Your assumption that it is a bulletin is correct. I don't think you are bound by the bulletin.

The Court: Do you have the paper, whether you 52 call it a bulletin or something else?

Mr. McGarr: No, your Honor, and I have no intention of introducing it. I don't think it is relevant. Perhaps I could rephrase the question and cover the whole thing subject to that objection.

By Mr. McGarr:

Q. Will you indicate, Miss Herrs, what you did with some or all of these $2 bills after you received them?

By the Witness:

A. I turned them over to the FBI.

Q. Do you remember the name of the FBI Agent to whom you gave them?

A. Mr. Hunter.

Q. Do you know an FBI Agent, or have you met an FBI Agent by the name of Pedrotty?

A. No. I don't remember.

Mr. Gorman: Will you repeat that name?

Mr. McGarr: Pedrotty.

By Mr. McGarr:

Q. Your answer was you don't remember?

53 By the Witness:

A. I don't remember.

Q. Before you turned these $2 bills over to the FBI did you make any effort to locate the particular departments in the store from which they came?

A. I don't understand? Did I make any—

Q. Did you make any effort to locate the departments in the Sears store from which these bills came to you?

A. Yes.

Q. Were you able to do so?

A. Yes.

Mr. McGarr: I would like to have these $2 bills marked as Government's Exhibits 5 to 9, inclusive.

(Said $2 bills were thereupon respectively marked Government's Exhibits 5 to 9, inclusive, for identification.)

By Mr. McGarr:

Q. I show you, Miss Herrs, two $2 bills marked for

54 identification Government's Exhibit 5 and 6, and ask you if you ever recall seeing those particular bills before?

By the Witness:

A. Yes, I did.

Q. On what occasion did you see those?

A. I marked them here (indicating). It was from eighty-seven.

Q. That pencil marking "87" you say you marked?

A. Yes.

Q. What does that mean to you?

A. It was taken out of this register.

Q. What, if you know, does register 87 stand for?

A. The candy department.

Q. The candy department?

A. Yes.

Q. What bill are you referring to now?

A. This one (indicating).

Q. You are referring to Government's Exhibit 5 for identification?

A. Yes.

Q. Now looking at this one marked for identification as No. 6, have you seen that before?

A. Yes, sir.

Q. Do you see any notation which you placed 55 thereon?

A. Service Station 77.

Q. What does "77" indicate to you, if anything?

A. The register in the service station.

Q. By the service station do you mean the gas and oil station at Sears?

A. Yes, sir.

Q. I will show you this bill that has been marked for identification as Government's Exhibit 7. You realize that these are dark, but have you seen these before?

A. Yes, sir.

Q. Do you see any markings on any of those which you placed thereon?

A. Yes, sir. They are marked "Credit".

Q. And what does that symbol mean to you, if anything, concerning the source of those bills?

A. They came to us—

Mr. Green: If your Honor please, I will object to what they signify unless we have some foundation laid as to how she knows and when she placed those numbers on there, or how she traced them through those registers.

56 Mr. McGarr: Perhaps I can cover that, your Honor, and satisfy the objection raised by the defendant.

By Mr. McGarr:

Q. When did you place those markings on these particular bills, Miss Herrs?

By the Witness:

A. When I received them out of the bag.

Q. When you received them out of the bag?

A. Yes.

Q. Do you recall on or about what date that was?

A. The same date.

Q. The same day as what?

A. January—it was that Saturday.

Q. I see.

Was it the same day when you received them out of the bag that you turned them over to the Agent of the FBI?

A. No, that was on a Monday.

Q. That was on a Monday?

A. Yes.

Q. Are you able to tell from an examination of those three bills which you have in your hand, being Gov-

57 ernment's Exhibits for identification 7, 8 and 9, from what department of the store they came from?

A. Yes, sir.

Q. How do you know that?

A. They came in on a pick-up from the lingerie department, and then they go to the credit office.

Mr. McGarr: No further questions.

Cross Examination by Mr. Green.

Mr. Green (addressing Mr. McGarr): May I see those exhibits, the $2 bills?

Mr. McGarr: Yes, sir.

(Whereupon Mr. McGarr handed some $2 bills to Mr. Green.)

By Mr. Green:

Q. Again, Miss Herrs, tell me how you were able to identify the $2 bills which are Government's Exhibits 6, 7 and 8.

By the Witness:

A. They were turned in and—

Q. How were you able to identify these as being the bills which you turned in?

58 A. These three?

Q. Yes?

A. The same way as I identified those (indicating).

Q. How were you able to identify them?

A. I had a list of the serial numbers.

Q. How were you able to identify these as being the bills you turned in?

A. From my list.

Q. From a list containing a great number of bills? Wasn't there a substantial number of bills on this list that you are speaking of?

A. Yes.

Q. And here (indicating) are three $2 bills. How are you able to identify these three as the bills which you turned over to the, as you say, the FBI?

A. Because of the marking on here (indicating).

Q. That is all I want to know. What markings?

A. There is a mark on here. I put "Cr" credit.

Q. Will you point that mark out?

A. I can't see it very well.

The Court: You may stand up under the light, if you want to.

59 The Witness: Thank you.

By the Witness:

A. (Continuing) Right here is one (indicating).

By Mr. Green:

Q. What is that?

By the Witness:

A. Pardon?

Q. What is it?

A. It says "Cr.", and there are some markings I can't see.

Q. When was this mark "Cr." placed on these three bills?

A. At the time of the accounting.

Q. And were these bills in this condition at that time? I am speaking now throughout about Government's Exhibits 6, 7 and 8?

A. I can't remember that. I couldn't answer that.

Q. Were they black like that (indicating)?

A. I don't remember.

Q. You don't remember whether they were this black or not?

A. No.

Q. You handle a great deal of money in your capacity in the store?

60 A. Yes, sir.

Q. Did you ever accept money which looks like the money I have in my hand, Government's Exhibits 7, 8 and 9?

A. I don't accept the money. The money is sent to me.

Q. Does money ever come through your department which resembles that money?

A. They are very dark, yes, sir.

Q. That dark?

A. Yes, sir, I would think so.

Q. When you turned these bills over to the Federal Bureau of Investigation did all of them look approximately the same as far as the color and age were concerned?

A. I couldn't say that. I don't know.

Q. What does the "Cr.", which I notice on this bill, signify?

A. Credit.

Mr. Green: That is all.

Mr. McGarr: No further questions.

The Court: That is all, madam.

The Witness: Thank you.

(Witness excused.)

61 Mr. McGarr: We will call Mrs. McFeely.

The Clerk: Will you raise your right hand and be sworn, please.

(Witness duly sworn)

ANN McFEELY, called as witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. Will you state your name, please?

By the Witness:

A. Ann McFeely.

Q. I understand you are business or working woman, Mrs. McFeely?

A. Yes, sir.

Q. And what is your current business or occupation?

A. I work in a finance office as a credit clerk.

The Court: Speak louder, please.

By the Witness:

A. (Continuing) I work in a finance office as a credit clerk.

By Mr. McGarr:

Q. Where, if any place, were you employed on
62 January 14, 1955?

A. At Sears Roebuck, at the North and Harlem Avenue Store.

Q. In what department, if you remember, were you working on that particular day?

A. Department 38, lingerie. That includes sweaters, and bathing suits, and lingerie.

Q. Do you recall on this Saturday, January 14, whether you received any $2.00 bills on that day?

A. Yes, I did.

Q. How many, if you remember?

A. Three $2.00 bills.

Q. Do you recall whether you received those from different persons or from one person?

A. All from one person.

Q. Do you recall on this Saturday, January 14, whether a purchase was being made with the three $2.00 bills?

A. Yes, an orlon sweater.

Q. What, if anything, did you do with these bills after you received them?

A. Well, I don't usually like to keep $2.00 bills in the cash register with the other money, so I put them underneath.

63 Mr. Green: I object to that.

The Court: That goes out.

By Mr. McGarr:

Q. Just indicate what you did with them.

By the Witness:

A. I put them under the change drawer that is in the cash register. Then I took them up to the cashier's of-

fice before I left for dinner with a deposit with the rest of the money.

Q. Do you recall who it was that made this purchase with these $2.00 bills, was it a man or woman?

A. It was a man.

Q. Do you see that man in the court room?

A. Yes.

Q. Will you point him out?

A. There (indicating).

Q. Are you indicating the first, second or third man?

A. The third man.

Q. The third man?

A. Yes, sir.

Mr. McGarr: Let the record show that witness has pointed out the defendant, Nicholas Guido.

64 No further questions.

The Court: Cross examine.

Cross Examination by Mr. Gorman.

Q. What date was that—is that Miss or Mrs.?

A. Mrs.

Q. Mrs. McFeely, that this purchase was made?

A. January 14, around that time. January 14.

Q. Of what year?

A. 1956.

Q. How are you able to fix that date?

A. Well, I can't say how I was able to fix the date. It was the date that the money was turned in, and it was the date because two days later it was that they questioned me about whether I had accepted some $2.00 bills in my purchases on that date.

Q. Is that the date now, over a year and some months ago, is that correct?

A. Yes, sir.

Q. You have no doubt in your mind but that was the date?

A. No, because I had to put the date on the little receipt that I bring up with my deposit for the money
65 to the cashier. We date that date.

Q. On the same date?

A. On the same date.

Q. You say it was unusual for you to receive $2.00 bills?

A. Well, these $2.00 bills, brand new crispy $2.00 bills was. I never had received them in this store before and I worked there for over a year.

Q. And you have identified as the person who gave you these $2.00 bills Mr. Guido, is that correct?

A. Yes.

Q. Did you ever see him before that date?

A. No, sir.

Q. And have you ever seen him since that date?

A. No, sir.

Q. Not until you walked into the court room?

A. No, I saw him this afternoon in the hall.

Q. That was the first time?

A. That was the first time I had seen him since then.

Q. Did you have a conversation with the defendant in the hall today?

A. Yes, I asked him if he knew where the witness room was. He said there wasn't any; he didn't know.

Q. You didn't recognize him at that time as the
66 defendant, did you?

A. I couldn't say right now. Should I?

Q. As a matter of fact, you didn't, did you?

A. Well, I recognized the man.

Q. But you didn't recognize him at that time as the man who gave you those $2.00 bills?

A. I didn't know he was the defendant here.

Mr. Gorman: That is all.
Mr. McGarr: No further questions.
The Court: That is all, madam.
(Witness excused)

The Court: Do you have a short witness or a long witness?
Mr. McGarr: I have a short one, your Honor.
The Court: All right. Put him on.
Mr. McGarr: We will call Mr. Messersmith.
The Clerk: Will you raise your right hand and be sworn.
(Witness duly sworn).

GLENN MESSERSMITH, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

67 Q. Will you state your name, please?
By the Witness:
A. My name is Glenn Messersmith.
The Reporter: Will you spell your name, please?
The Witness: Glenn, G-l-e-n-n, Messersmith, M-e-s-s-e-r-s-m-i-t-h.
By Mr. McGarr:
Q. What is your business or occupation, sir?
By the Witness:
A. My business is teaching.
Q. Calling your attention to January, 1956, what was your occupation at that time?
A. At that particular time, I was working part time at Sears in the Candy Department.
Q. Calling your attention to Saturday, January 14, 1956 were you working on that day?

A. Yes, I was. That was a Saturday.

Q. At what counter and in what department did you work on that day?

A. I was working in the Candy Department on that particular time.

Q. On that day, do you recall whether you received in exchange for goods sold a $2.00 bill?

68 A. Yes, I did. I received a new $2.00 bill.

Q. Do you remember what was purchased with that bill?

A. Yes, the purchase was a pound of milk chocolate costing 59 cents, with tax, 61 cents. Out of the $2.00 bill.

Q. What, if you recall, did you do with the $2.00 bill after you received?

A. When I received the bill I put it under the other bills where I wouldn't get it confused with a $5.00 bill.

Q. I assume this was in the cash drawer or the cash register?

A. Yes. It was placed in the cash register at the bottom under a stack of bills.

Q. How long did all that money remain in your register?

A. That $2.00 bill remained in the drawer until the end of the business day, and then it was sent to the cashier's office.

Q. In what way, if you recall, was the chocolates which you sold wrapped or packaged?

A. The chocolate was packaged in a bag, and that

69 bag was white with red, with a red and blue design on it.

Mr. McGarr: I would like to have this marked as Government Exhibit 10 for identification.

(Whereupon said candy bag was marked Government Exhibit 10 for identification.)

By Mr. McGarr:

Q. I show you, Mr. Messersmith, a bag with the legend "Sears Fine Candies", marked for identification as Government Exhibit 10, and I will ask you if this is the type of bag which you used to package chocolate at that time?

Mr. Green: I object to that, the type of bag is not relevant here.

The Court: How is this material?

Mr. McGarr: It was recovered under circumstances to tie in the defendant, your Honor. There will be further testimony relating to it.

Mr. Green: I object to it being the type of bag. If it is going to be more identified, I will have no objection to it.

70 Mr. McGarr: He can't say it was the precise bag. That would be an unfair question. I think the question is proper, your Honor, and he could properly answer it.

The Court: Then you are going to have some testimony as to where this particular bag was found?

Mr. McGarr: That is right.

The Court: He may answer that question.

The Witness: What was the question?

Mr. McCarr: Read the question, please.

(Question read).

By the Witness:

A. Yes, this is the type of ba_ that we used, the same design.

By Mr. McGarr:

Q. Do you think Mr. Messersmith, you could identify the man who gave you that $2.00 bill?

Mr. Green: That will be objected to, your Honor, if he thinks he can identify him.

The Court: Yes.

Mr. McGarr: I will withdraw the question.

71 (Question withdrawn)

By Mr. McGarr:

Q. Could you, at this time, identify the man who gave you that $2.00 bill?

By the Witness:

A. No, no, I could not.

Mr. McGarr: No further questions.

Cross Examination by Mr. Green.

Q. This was the general type of bag that you were using during the month of January, 1955, is that so?

By the Witness:

A. This is the bag that we packaged the candy in.

Q. And you used a great many such bags, I presume, did you not?

A. Yes, sir, we had innumerable bags like that.

Mr. Green: That is all.

Mr. McGarr: That is all.

Thank you very much.

The Witness: Yes, sir.

(Witness excused)

Mr. McGarr: We will call Mr. Edgar.

72 The Clerk: Will the witness be sworn.

(Witness duly sworn)

ROBERT EDGAR, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. State your name.

By the Witness:

A. Robert Edgar.

Q. Your business or occupation?

A. Service Manager.

Q. Calling your attention to January, 1956, where were you employed at that time?

A. At Sears Roebuck.

Q. In what capacity?

A. As the foreman or service writer.

Q. Of what department in Sears?

A. That was the garage.

Q. What do you do at that garage?

A. We do, minor repairs, lubrication, oil change, etc.

Q. On Saturday, January 14, 1956 were you working in the Sears Service Department? 73

A. Yes, sir.

Q. Do you recall on that date whether you took from a customer a $2.00 bill?

A. Yes. There were four of us working at the time on the floor writing orders, and it so happened I remember the $2.00 bill.

Q. Do you recall what service or product was being paid for with this bill?

A. For lubrication and oil change.

Mr. McGarr: I would like to have this marked as Government Exhibit 11 for identification.

(Whereupon said document was marked Government Exhibit No. 11 for identification).

By Mr. McGarr:

Q. I show you a document marked for identification as Government Exhibit 11 which purports to be a Sears Robuck form and ask you if you recall seeing that before?

By the Witness:

A. Yes, sir.

Q. Who, if you know, made the handwritten entry on that slip? 74

A. I did.

Q. Is that the original slip or a copy?

A. This is the—you might call it the work order.

Q. Is that a carbon of the original?

A. There are two copies. The first copy the customer gets, and the second copy is held in the files. In other words, this belongs the office of Sears.

Q. Is that document, Government Exhibit 11 for identification, related to the transaction you have described wherein you received a $2.00 bill?

A. Yes, sir.

Q. What was done; what service was performed, or product sold in connection with the receiving of this $2.00 bill?

A. The automobile had a lubrication and oil change, and naturally, checked the transmission, differential, tires, battery and etc.

Q. Was there any other service performed?

A. In relation to this?

Q. In relation to the automobile to your recollection?

75 A. Yes, the engine kept dying out and we tried to—

Mr. Green: I am sorry, but I can't hear you.

By the Witness:

A. (Continuing)—the engine kept dying and we tried to adjust the idle so we could get it on the grease rack and back off again.

Q. What type of a car was it, if you recall?

A. A Cadillac.

Q. Do you recall the color?

A. Black.

Q. Do you remember the year or model?

A. I would say, roughly, around 1954 or 1955.

Q. Did you record the license number of this automobile?

A. Yes, sir.

Q. And where was that recorded?

A. Right on the ticket.

Q. Was that the practice at the Sears Service Station?

A. It is always the practice to put the license number down.

Q. Did you receive the $2.00 bill you testified to
76 from the man who had that work done on his car?

A. Yes, sir. A two and a one and some change.

Q. What was the total amount of the total bill which Sears charged this man?

A. $3.06.

Q. Was the $2.00 bill received a part of that?

A. Right.

Q. What do you recall, if you recall, was done with the $2.00 bill after you received it?

A. Put the cash in the drawer, and from then on I didn't see it. They close their bank every night. I believe they have a separate messenger that picks up the money and brings it over to the main store.

Q. Did you see the man who gave you the $2.00 bill drive that black Cadillac away?

A. No.

Q. Did you see him get into it?

A. I saw him when he drove the car in and I wrote the original order, yes.

Q. Do you see that man in the court room now?

A. Yes, sir.

Q. Will you point him out, please?

A. He is the gentleman over there in the brown suit.

77 Q. Is that the first, second or third man at the table?

A. The third man from you.

— Mr. McGarr: Let the record show the defendant Guido has been indicated by the witness.

No further questions.

Cross Examination by Mr. Green.

Q. You made all these entries at the same time the transaction was performed, is that right?

By the Witness:

A. Yes, sir.

Q. And you never saw Mr. Guido before that day, did you?

A. No.

Q. And you never saw him after that day until today, is that right?

A. That is correct.

Q. This was the license number of the Cadillac which Mr. Guido drove?

A. Yes, sir.

Mr. Green: No further questions.

The Court: Is that all?

78 Mr. Green: That is all.

The Court: That is all, Mr. Witness.

The Witness: All right, sir.

(Witness excused)

The Court: We will take a recess until tomorrow morning at 10 o'clock.

The jury only works a half a day on Friday in this court. We have contested motions in the afternoon on Friday with which the jury is not concerned. So, we will tell you now that you only have to work a half a day tomorrow.

(Jury dismissed, and the following took place outside of the presence and hearing of the jury.)

Mr. Green: Your Honor, I don't know the exact turn the government's case is going to take here, but I presume it is going to have something to do with an analysis of soil samples, mud samples that were taken. I assume that is correct.

Mr. McGarr: Yes, sir.

Mr. Green: I would like to have a portion of those soil samples furnished to the defense at this time so that we might have some kind of an examination.

79 Mr. McGarr: I don't know what it will show. I have no idea.

The Court: You are going to have soil samples, experts, and what else?

Mr. McGarr: That was all we were talking about, your Honor. The soil in the boxes taken off of the counter will be related to the soil taken from the instep of a pair of shoes which we think the evidence indicates belongs to the defendant.

The Court: Will you give Mr. Green a portion of that? The dirt or whatever you call it?

Mr. McGarr: We will be glad to.

I have only one here, but I will get the other for you. It is down in the office.

Mr. Green: Do you think you will finish tomorrow morning?

Mr. McGarr: No, there is no chance. We will go over until Monday.

Mr. Gorman: Will you reach that technical evidence tomorrow?

Mr. McGarr: No, I don't believe so. It probably will be Monday before that expert is on the witness stand.

The soil man has gone to Miami over the week end. I 80 still don't think we will reach it until Monday.

The Court: All right, then we will see you in the morning.

(Whereupon were all the proceedings had an taken in the above-entitled matter on the day above-described, and the further hearing was continued until 10 o'clock Friday, April 26, 1957.)

81

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 56 CR 62) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled case taken before the Hon. Michael L. Igoe, one of the Judges of said court, with a jury, in his court room in the United States Court House at Chicago, Illinois, on Friday, April 26, 1957 at 10 o'clock a.m.

Appearances:

Hon. Robert Tieken,
U. S. District Attorney, by
Mr. Frank McGarr, and
Mr. Howard Sodergran,
Assistant U. S. District Attorneys,
representing the plaintiff;

Mr. Richard E. Gorman, and
Mr. Joseph E. Green,
representing the defendant.

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82 The Clerk: 56 CR-62. U. S. vs. Guido. Case on trial.

(Whereupon the following took place outside of the presence and hearing of the jury.)

Mr. Green: Before the jury is recalled, your Honor, we have a matter we would like to take up with you.

The Court: All right.

Mr. Green: I don't know if this is a timely presentation of the matter, but I think it is only fair to the government, and the defense intends to bring this to the Court's attention at this time:

At the conclusion of court last night, there was some colloquy concerning certain, what I take it to be soil samples which were contained, one in a pill box which allegedly contained dirt and which was taken from the counter of the bank in question. There was a second box which has not yet been identified, I believe, which contained a sample that was taken from a shoe.

Your Honor, upon the request of the defendant, suggested that the defendant be furnished with those
83 samples for such benefit as that might afford him in making examinations.

Now, the remarks that I am about to make I don't want it to be interpreted in any way as questioning the willingness of Mr. McGarr to comply with the Court's direction. That willingness is manifest.

Nor, on the other hand, and furthermore, I don't want to be understood as questioning at this time the correctness of the identification or comparison, or the scientific tests that were performed by the experts from the Federal Bureau of Investigation on the samples. I am not in any way imputing that agency.

I am, however, addresing myself to the principle of us being required to obtain such samples for our own use.

Upon going to the office of the United States Attorneys last evening after adjournment of court, and I know that Mr. McGarr will correct me if I misstate this, I was shown the two boxes. I was advised that the samples which remained in those boxes were very small; that the reason for the small amount that remained there which was
84 inadequate for the purpose of testing was because the Bureau in making its analysis in Washington had

consumed a great portion of these soil samples which were admittedly very small to begin with, considerably less than a fraction of an ounce, I understand.

Now, the end result of the inability, not the unwillingness, but the inability of the Government to provide the defense with such samples, leaves us in this position which I think is a matter of principle, and as a matter of law, it is most unfair to the defense. We will be required upon the presentation of the evidence which is obviously forthcoming, and I admit and concede I am taking this up out of order because this evidence has not been presented as yet, but we all know that it shall be. We are compelled to acquiese without a check of any kind on our part in the conclusion expressed by the Government's witnesses.

Now, I know the Government's witness, and I am not arguing this, no doubt has performed a correct test, but unless, under the law, there is a means given to the defense to check and verify such a conclusion, we simply are no longer having a trial by the Court and jury, but we have a trial by experiment, and by a scientific analysis conducted in the bowels of some laboratory in a building some 900 miles distance.

I will say, and the only purpose for my remarks at this time, and which I say it admittedly out of proper sequence, is that unless we can be furnished with a sample, and I understand we cannot, a sample adequate for the purpose of making the necessary tests then we have no alternative but to object, and we object most strenuously upon the offer of such evidence.

I wish to address myself to the Court at this time on this because if there is a way to rectify this, I think it should be reported to the United States Attorney at the earliest opportunity.

Mr. McGarr. Mr. Green will corroborate, I am sure, that we did offer the boxes we had, and neither of us

opened them, but upon shaking them it was obvious they had very slight content. You could hear something rattling around, but it wasn't very much.

Mr. Green: That is right.

Mr. McGarr: I made available by calling the hotel and having him come over, the man who will testify. He
86 had a conversation with Mr. Green last night and again this morning. We haven't tried to be coy about this or to conceal anything, but I think the distinction which Mr. Green fails to observe in his argument is this, the expert will testify, and he will testify as to the conclusions drawn from certain facts. Those facts are two samples of soil, and other witnesses will indicate where they came from and how they got it to the expert.

As an expert, however, the thrust of his testimony is the conclusion that there is an identity between those two samples of soil, and that conclusion is not beyond the reach of cross examination. It is not beyond the reach of a very intensive questioning of the witnesses as to its foundation. It is not beyond the reach, for instance, of an expert produced by the defense who could work upon the hypothetical created by the testimony of our expert and disagree with the conclusion. I don't think it can be accepted as a principle of law that when an expert testifies as to a conclusion drawn from the fact, that if as a matter of necessity in making an analysis of a particular
87 item or product, or a piece of material, he must consume a portion of it. I don't think it could be stated as a principle of law that his conclusion as to that material would thereby become inadmissible because he can no longer make available the result or the product he examined to the defense. A spectroscopic examination, for instance, which is a standard type of examination in crime detection, although it is not involved here, is very frequently involved in burning a product to determine

the rays given off and so forth, and the product is invariably destroyed. Yet, it has never come to my attention that it has been held the testimony of the expert who made that examination is thereby rendered inadmissible because the product he examined was destroyed.

I think the distinction to be made here is that the right of the defendant to question the conclusion of the expert is certainly a right that exists and should be respected. But the right is in no means derogated from by the fact that we cannot produce the samples he worked from since, as I say, he can be cross examined, and other experts can disagree with his conclusion, and he can be made to
88 produce in great detail what he found when he examined those particular items. Anything else merely goes, I think, to his credibility, rather than to his availability for challenge and cross examination.

Mr. Green: If the Court please, I readily agree with everything that Mr. McGarr has said, that we have the right of cross examination, and that we would have the right to call our own expert in order to assist us in propounding a hypothetical question to the Government's expert.

We, however, are unable to perform the same tests that the Government performed.

Now, where does that leave us? I am not speaking of this particular case, but I am speaking of the general application of the rule. We have two boxes of substance here which were introduced with all of the imprimatur of scientific analysis which goes before this jury which is undoubtedly impressive to a jury. We are, as a practical matter, denied the right of an analysis of that scientific evidence.

As a matter of fact, in the evidence in this very case we have one box which has already been identified
89 as an exhibit, and we have another one which will shortly be identified. Now, if in fact these boxes con-

tained nothing which is of any value to the defense, the obvious impact of that upon any jury would be, "Well, that material was right there." That isn't true. We are deprived of the only effective means that we have to verify the conclusion of the expert. All be it, his conclusion may be correct in this case, it requires no great imagination to conceive a thousand cases, or a thousand qualms, or a thousand distant times when we are unable to similarly rely upon the correctness of an analysis of any witness.

I respectfully submit that we should have the same material available to us as does the Government.

This is not a case where a burning took place of the evidenciary material. This is simply a case where apparently the evidenciary material has been left on the floor of the laboratory in Washington. Unless we are similiarly provided with the same material with which the Government has access, I very earnestly represent to this Court that it is our feeling that such is inadmissible.

90 Now, as I said, I wanted to bring this up in a timely fashion, seasonably before the offer, so that if there is any way that that can be rectified by the Government, the Government will have the opportunity of so doing.

The Court: As I understand it, this one box which you say contains some dirt which was gotten out of the place where this crime is alleged to have occurred is of such a quantity as to make it valueless to anybody who might want to make an inspection or analysis of it?

Mr. McGarr: There was a very slight quantity to begin with, and in the process of the analysis some of it was destroyed, and the quantity is even less now. I don't know if it is valueless or not. I know it is very slight.

You discussed it with the metallurgist, did he say anything about it?

Mr. Green: I would like to have him brought in, because in the event I have misstated what he said, I would like to have him correct it.

Mr. McGarr: But the point I am making, your Honor, is this: This happens every day in cases. Suppose a man is shot and a physician attends him. The man is
91 buried. The physician later takes the stand and testifies as to certain physical characteristics he observed, the wound, the position or something of the sort, and then an expert can draw conclusions from those facts. The fact that the body of the man is not available to the defense, does not matter any more than any witness testifying as to facts. His credibility is open on cross examination, and the value of his testimony may be examined. But the facts he testified to are not now available by original observations to the defendant is something that happens to practically every witness who is put on the stand.

The dirt in this case is nothing more than a fact. The conclusions that this man draws from that fact are open to all the cross examination desirable. I think here we are trying to merely put a new complexion on a situation which probably will be—

The Court: What is your expert's opinion, based upon the analysis he made down in Washington, or what is in this box?

Mr. McGarr: The analysis he made in Washington of that material.

92 The Court: Upon an inspection of some material.

Mr. McGarr: That is right.

The Court: Then I think they have a right to be in a position to have that same material present so they can cross examine your witness and find out from him upon which he bases the different conclusions relative to the article that is now before him as a witness, or before you gentlemen as attorneys.

Mr. McGarr: Our position, of course, is that in analyzing this material, he necessarily destroyed some of it and we are perfectly willing to tender and we have what is left.

The Court: But the point which confronts us now is, is there sufficient of the material to permit an analysis being made by the experts representing the defense?

Mr. McGarr: But to conclude, your Honor, if an analysis necessarily results in the destruction of the material, that that analysis thereby becomes valueless as evidence is, first, to impose an unreasonable burden upon criminal investigation, and make impossible much of the scientific evidence.

Secondly, I don't know that there is any foundation
93 in law, none has been presented here, in support of this theory. There is no precedent for it. I think, actually, your Honor stated the proposition correctly when you said that if the man who examined the material and drew some conclusions the defense has a right to test those conclusions, and they can question him on what he found in so far as his examination, but if his examination necessarily destroyed some of the material, and I repeat, I don't know whether what is left is sufficient for another examination or not.

The Court: Well, suppose this expert was to say, "I found thus and so upon an examination of this material." Wouldn't the defendant have a right to gather that material and present it to the witness then under cross examination, and ask him to show upon what he based the statement he just made concerning that particular article? He can't do that if the article isn't here.

I take it that is the difficulty confronting Mr. Green.

Mr. McGarr: The necessary corollary to that would be to conclude that if in analyzing anything the chemical
94 analysis or the microscopic analysis results in the destruction of anything then that analysis is useless and unavailable to the courts of law because of that

destruction. I think that is a conclusion so broad in its implication that it cannot flow from that premise.

The Court: I don't know. I think we are going to get into a lot of serious trouble if we could have material presented to an expert, and in his analysis of the material so presented he destroys it, then he comes into court and gives the result of the conclusion he drew before the material was destroyed.

I think we are getting into deep water when we do that.

He wanted to ask this man some questions?

Mr. Green: No, I simply wanted to have him here, because we talked about this last evening, and we talked about it again briefly in the corridor, and in the event I have made any either inadvertent or misrepresentations as to the nature of the boxes' content to the Court, I could be corrected by the gentleman from Washington.

The Court: The only question I thought was confronting us was this, is there sufficient material in that box
95 to permit an analysis to be made by your representatives?

Mr. Green: A similar analysis, as made by him.

Mr. McGarr: Will you describe the analysis you made, Mr. Jebons?

The Court: State your name, sir.

Mr. Jebons: My name is Roy Jebons.

There was approximately a half a gram of material in one of the specimens.

The Court: A half a gram?

Mr. Jebons: About a half a gram.

The Court: How many grams are there in a ounce?

Mr. Jebons: There are about 30.

The Court: And this is a half a gram?

Mr. Jebons: Yes, sir.

The Court: This is about one-sixtieth of an ounce?

Mr. Jebons: Approximately, yes, sir. And I would say

approximately half of that, or maybe a little more was used during the course of the analysis.

Mr. McGarr: And there is approximately half of the original sample in the box?

Mr. Jebons: I would say approximately half.

Mr. McGarr: You made a microscopic analysis,
96 is that a correct description of it?

Mr. Jebons: Yes, and some of it was used in identifying the components. That was necessary.

The Court: He says there is about the same amount remaining in the box as that he used in making his analysis.

Mr. Green: I think, your Honor, you misunderstood him. Let me ask him a couple of questions.

In making up your analysis, as I understand it, you used the entire sample which was presented?

Mr. Jebons: I examined the entire sample.

Mr. Green: The entire sample?

Mr. Jebons: The entire sample.

Mr. Green: You were able to salvage a little less than one-half of that sample, is that correct?

Mr. Jebons: Yes, sir.

Mr. Green: Now, what the Court wishes to know is, if the amount of material which you salvaged, and which remains in those boxes is adequate for us to correctly make, for our expert to correctly make the identical tests which you made?

Mr. Jebons: That remaining probably would not be a representative of the entire sample that I had because necessarily I had to use a portion of it.

97 The Court: Oh, well, I don't think we need to spend much more time on this.

You haven't presented anything on it yet?

Mr. McGarr: No, your Honor.

The Court: Upon the discussion we have had, I don't think I should allow that piece of testimony to go in.

Bring the jury in.

(Whereupon at 10:47 a.m., the jury was brought into the court room and the following took place in the presence and hearing of the jury.)

The Court: Good morning, ladies and gentlemen of the jury.

The Jury: Good morning, your Honor.

The Court: Proceed, Mr. McGarr.

Mr. McGarr: We will call Mr. Pedrotty.

The Clerk: Will you raise your right hand and be sworn, please?

Mr. Pedrotty: Yes, sir.

(Witness duly sworn)

LEO A. PEDROTTY, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

98 *Direct Examination by Mr. McGarr.*

Q. Will you state you name, sir?

By The Witness:

A. Leo A. Pedrotty.

Q. You business or occupation, Mr. Pedrotty?

A. I am a special agent for the Federal Bureau of Investigation.

Q. At what office are you assigned?

A. The Chicago Office.

Q. Were you assigned to that office in November, 1955?

A. I was.

Q. In the course of your duties as a special agent for the FBI, were you assigned to investigate or any part of the investigation of a robbery of the Maywood Proviso State Bank?

A. I was.

Q. In the course of that investigation, did you have an occasion to visit the Sears Store at North Avenue and Harlem Avenue?

A. I did.

Q. About what date, if you recall, was that?

A. About January 6, 1956.

99 Q. And in the course of your visit to the store, did you see Mrs. Herrs, the Chief Cashier?

A. I did

Q. I will show you, Mr. Pedrotty, five $2.00 bills marked for identification as Government Exhibits 5, 6, 7, 8 and 9, and I will ask you if you have seen those bills before?

A. I have.

Q. How are you able to identify them?

A. By the notations made on here. One has "Bag 87". Another has the number "77". One has "CB", and another has "CB". And Mrs. Herrs advised me that she had put—

Mr. Green: I object your Honor.

The Court: Objection sustained.

By Mr. McGarr:

Q. Did you receive those bills from Mrs. Herrs?

By The Witness:

A. I did.

Q. After you received them, what did you do with them?

A. I sent them to the identification division for fingerprinting process.

Q. And where is that located?

100 A. Washington, D. C.

Q. Do you know the defendant Nicholas Guido?

A. Yes, I do.

Q. Do you see him in the court room?

A. Yes, sir, I do.

Q. Will you point him out, please?

A. He is the third man sitting at that table over there (indicating).

Mr. McGarr: Let the record show that the defendant Guido has been identified by the witness.

By Mr. McGarr:

Q. Calling your attention to January 17, 1956, did you see him on that date?

A. Yes, I did.

Q. Where was that?

A. 1110 South Austin Boulevard.

Q. Was that outside or inside?

A. That was inside.

Q. What type of a building is it?

A. It is an apartment house.

Q. On that occasion, did you participate in a search made of Mr. Guido's apartment?

A. I did.

101 Mr. Green: Your Honor, I will object to that unless —the question that was propounded was a search made of Mr. Guido's apartment, and the witness must be able to identify that as being his apartment.

The Court: Yes.

By Mr. McGarr:

Q. Was Mr. Guido in this apartment at that time?

By The Witness:

A. He was.

Q. Was there any conversation with Mr. Guido at that time?

A. I had none.

Q. Was Mr. Guido, to your knowledge under arrest at this time?

A. Yes, he was.

Q. Was a search made by you or others of the apartment?

A. Yes.

Q. What was it you found in the course of that search?

A. Well, I will have to check my notes on that.

Q. You say then you are unable to remember the
102 specific items you found without reference to your notes?

A. That is right.

Mr. Green: Your Honor, there is an objection to this and I would like to be heard on it outside of the presence of the jury.

The Court: The jury may take a recess for a few minutes.

(Whereupon the following took place outside of the presence and hearing of the jury.)

Mr. Green: The witness is about to relate, I presume, that at the time the apartment in which Mr. Guido was present, and which the witness has testified he was arrested, so there is no question and the point it not being made at this time that the search was not made incident to an arrest. I think the witness or some of his associates were in possession of the Commissioner's warrant so there was a lawful arrest made at that time of Mr. Guido.

103 However, there were taken from the apartment certain articles which are of a greatly inflammatory nature that are not connected with the offense for which the defendant is now on trial.

Mr. McGarr: I might save some time.

We don't intend to use this witness to introduce the ammunition. For that purpose perhaps he can tell you what he will testify to, and you might not object to it if you understand it.

Mr. Green: That was the basis of my objection that there were some other articles found.

The Court: Maybe you are screaming before you are hurt.

Mr. Green: I didn't want to postpone the objection until I was, your Honor.

The Court: Could you tell him what you were going to use this witness for?

Mr. McGarr: I expect this will say that he observed, but he did not take a Cadillac Motor Car Division Sales Contract, indicating the puchase of the car by Nicholas
104 Guido, financed through Winter & Hirsch Finance Company; and Social Security Cards, three of them, with the names of Don Schiavone, Don Milo, and Nick Guido. A statement of account or a balance from Winter & Hirsch Finance Company, and that is all, your Honor.

The purpose of those is to identify the defendant Guido as to two things, one using the name Don Schiavone, and that is the name under which the car was financed.

Secondly, as dealing with Winter & Hirsch in the purchase of the Cadillac.

Mr. Green: I have no objection, your Honor.

The Court: All right, bring in the jury—

Mr. Green: Excuse me, your Honor. Mr. Gorman wants to see me.

All right, no objection.

The Court: All right, bring the jury in, Mr. Marshal.

The Marshal: Yes, sir.

(Whereupon the following took place in the pres-
105 ence and hearing of the jury.)

By Mr. McGarr:

Q. At the time of your participation in the search of this apartment, did you, Mr. Podrotty, make notes of the items you observed?

By The Witness:

A. I did.

Mr. Green: If the Court please, I think the witness should be limited to the search made and conducted in the

presence of the defendant, and not a general rummage expedition.

Mr. McGarr: I think the search was incident to the arrest, your Honor, and whether it was within the direct vision of the defendant is not material.

The Court: You may proceed.

By Mr. McGarr:

Q. Did you state earlier, as I recall, you were unable to recall all the items without referring to your notes?

By The Witness:

A. That is correct.

Q. Do you have those notes with you?

106 A. I do.

Q. Referring to those, would you tell us what items you observed in the process of the search of the apartment of Mr. Guido at the time he was placed under arrest?

A. I observed an envelope addressed to Grace Schiavone, 705 South Kedzie, Chicago, Illinois. It contained a sales contract, Cadillac Motor Car Division, Michigan Avenue Branch, dated July 16, 1955. It listed the purchaser's name as Grace Schiavone. It was an order for one Cadillac, series 62 coupe.

Mr. Green: Your Honor, I think the best evidence would be the contract rather than a description.

The Court: Yes.

By Mr. McGarr:

Q. Mr. Podrotty, do you have that contract with you?

By The Witness:

A. No, I do not.

Q. Did you take it from the apartment on the occasion of that search?

A. I did not.

Q. Do you know where it is now?

A. No, I have no idea.

107 Q. Will you continue to describe it?

Mr. Green: I move to strike that portion which he will read relating to the document where it describes it. The best evidence is the document itself.

Mr. McGarr: The best evidence is unavailable, your Honor. This is secondary evidence.

The Court: Why is it unavailable?

Mr. McGarr: It is in the possession of the defendant. We have no idea where it is. It was not taken from him or from his apartment, and he still retains it. He can produce it if he feels it is better evidence.

The Court: All he is going to testify to is he saw a document that he is now describing as being on those premises.

Mr. McGarr: That is correct.

The Court: And he permitted the document to stay there?

Mr. McGarr: That is correct.

The Court: The objection is overruled. He may answer the question.

108 Mr. Green: If the Court please, we have an additional objection to his reading the notes. I think the notes are only for the purpose of refreshing his recollection.

The Court: These men have testified enough, I thought they knew, they can look at a record and then they must testify without looking at it.

Mr. Green: Yes, sir.

The Court: He understands that, I take it.

Mr. Green: I believe he is reading it, your Honor.

The Court: He can read it and then testify.

By Mr. McGarr:

Q. Do you care to refresh your recollection by looking at those notes, Mr. Pedrotty?

By the Witness:

A. Yes, sir.

Q. Did this Cadillac Sales Contract which you referred to indicate any financial institution which was a party to the transaction?

109 Mr. Green: I object to that as being leading and suggestive.

The Court: He can ask him what else was indicated without putting the answer in the witness' mouth.

Mr. McGarr: I will withdraw the question.

(Question withdrawn)

By Mr. McGarr:

Q. What else do you recall was indicated on that Cadillac Sales Contract?

By the Witness:

A. That there was a lien held by Winter & Hirsch.

Q. Did you observe any other documents at that time?

A. Yes, I did.

Q. What were they, if you recall?

A. There was a statement of account from Winter & Hirsch.

Q. Was there anything else?

A. Yes, I noticed three Social Security Cards.

Q. Do you recall the names on those cards?

A. Nick Guido, Don Schiavone, and Don Milo.

Q. Where was it you found these cards?

A. In the bureau in the front bedroom.

110 Q. Were these three cards found in the same place?

A. Yes, they were.

Mr. McGarr: That is all.

Cross Examination by Mr. Green.

Q. Mr. Pedrotty, there were a number of agents present at the Austin Avenue address at that time, weren't there?

By the Witness:

A. Yes, sir.

Q. Would you name those agents?

A. I think there was Special Agents Peters, Hunter,—

Q. Hunter?

A. That's right. Gillem.

Q. I am sorry, sir?

A. Gillem, Sell, and Connolly. I can't recall any others.

Q. Which of these agents placed the defendant under arrest, if you know?

A. I believe it was Special Agent Connolly.

Q. Where was the defendant when he was placed under arrest in the apartment?

A. I do not know. When I came in he was in the front room.

111 Q. Who advised you he had been placed under arrest?

A. I believe, Special Agent Connolly did.

Q. You have no independent knowledge of your own that he had been placed under arrest?

A. No.

Q. Only what Agent Connolly told you?

A. That is right.

Q. He was not in the bedroom when you rummaged through the bureau?

A. He wasn't.

Q. At that time, was a search conducted in the apartment by other agents as well?

A. That is correct.

Q. And certain other articles were taken from the apartment by the other agents, is that not so?

A. That is right.

Q. What process, if any, was in your possession at that time?

A. There was none in my possession.

Mr. Green: That is all.

Mr. McGarr: Nothing else.

The Court: You may be excused.

The Witness: Yes, sir. Thank you.

112 (Witness excused)

Mr. Green: If the Court please, at this time I would like to move that all of the evidence given by this witness relating to anything that was found as a result of that search be suppressed, and the jury instructed to disregard it.

The Court: Why?

Mr. Green: The basis for my objection is two-fold: In the first place, this witness is unable to state and has failed to state that the search was made incident to a lawful arrest.

Number two, this witness has already stated that various and divers things were taken from the apartment, but the matters he has testified to are not, in view of the fact that other articles were taken, those matters and things he testified to could clearly be in the possession of this witness and would be the best evidence.

Therefore, Number 1, the search was improper as not being shown to make a lawful arrest.

Number two, the documents which he has related are not the best evidence.

The Court: I thought you admitted awhile ago the arrest was lawfully made?

113 Mr. Green: There is no evidence to that effect.

The Court: I thought you conceded that?

Mr. Green: No, sir.

The Court: I thought you did when you were standing there with Mr. McGarr.

Isn't that correct?

Mr. McGarr: That was my understanding.

The Court: Mine too.

Mr. Green: I thought there would be such evidence. But there wasn't any.

The Court: He said there was going to such evidence. So, we will take your motion under advisement until they present the other evidence if they do present the other evidence.

Mr. Green: Is the motion overruled on the second basis, that is, the documents are not the best evidence.

The Court: Yes, sir, that part I am not overruling. Proceed.

Mr. McGarr: We will call Mr. Hunter.

The Clerk: Will you raise your right hand and be sworn?

Mr. Hunter: Yes, sir.

114 (Witness duly sworn)

WILLIAM B. HUNTER, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. State your name, please.

By the Witness:

A. William B. Hunter.

Q. Your business or occupation, Mr. Hunter?

A. I am a Special Agent with the Federal Bureau of Investigation.

Q. And to what office are you assigned?

A. Chicago.

Q. Were you assigned to Chicago in November, 1955?

A. I was, sir.

Q. Did you participate in the investigation of a robbery of the Maywood Proviso State Bank?

A. I did.

Q. Do you know the defendant Nicholas Guido?

A. I do.

Q. Do you see him in the court room?

A. I do.

115 Q. Will you point him out, please?

A. He is sitting at the table over there. He is the third man at the far table.

Mr. McGarr: Let the record show that the witness has identified the defendant Guido.

By Mr. McGarr:

Q. Calling your attention to January 17, 1956, did you see him on that occasion?

By the Witness:

A. I did.

Q. Where was that?

A. 1110 South Austin Boulevard.

Q. Where was that?

A. In an apartment building.

Q. About what time was that, if you recall?

A. Around 5:15 p.m.

Q. Was there anyone else there?

A. I saw his wife, two small children and a baby.

Q. Anyone else besides them?

A. Beside myself, there was Special Agents Raymond Connolly, Joe Wheeler, Leonard A. Wolfe, George Gillem, and Walter Peters. Those were the ones I saw at that time.

116 Q. Was Guido, if you know, under arrest at that time?

A. He was being placed under arrest when I came into the room.

Q. By whom?

A. By Raymond Connolly.

Q. Was there a search of the apartment made subsequent to this arrest?

A. There was.

Q. Did you participate in that search?

A. I did.

Mr. McGarr: I would like to have these marked as Government Exhibits 12 and 12-A for identification.

(Whereupon said shoes were marked Government's Exhibits 12 and 12-A for identification.)

By Mr. McGarr:

Q. I show you, Mr. Hunter, a pair of men's shoes marked for identification as Government's Exhibits 12 and 12-A, and ask you if have ever seen those before?

By the Witness:

A. I have.

117 Q. How are you able to identify them?

A. I have my initials on the inside.

Q. Where was the first occasion, and when was the first occasion on which you saw those shoes?

A. I saw these in a closet in the apartment that was occupied by Mr. Nicholes Guido.

Q. Is that the apartment you just described as 1110 South Austin?

A. Yes, sir.

Q. Were these shoes displayed to Mr. Guido on that occasion?

A. Yes, sir.

Q. Was there any conversation at that time?

A. I asked Guido if these shoes belonged to him. He asked me, "Where did you find them?" I said, "In the closet." He said, "Well, they might be mine."

Q. Was there any other conversation relative to the shoes?

A. When I was leaving the apartment, right before I

left, I asked him if he had any objection to my taking the shoes, and he said, "You can take anything you want."

Q. Was there any conversation with Mr. Guido relative to your searching the apartment? Did he say
118 anything to you?

A. Not to me.

Q. Do I understand then, you took those shoes from the apartment on that occasion?

A. Yes, sir.

Q. What did you do with them after that?

A. I submitted them to the FBI Laboratory in Washington, D. C.

Mr. Gorman: I object, if your Honor please, to the use of the phrase he submitted them. Let us have him tell what he did with them.

The Court: Yes. I think that would be better.

By Mr. McGarr:

Q. What did you do with them, Mr. Hunter?

By the Witness:

A. I packaged the shoes up in the office for mailing, dictated a letter to the FBI Laboratory, indicating that I was submitting these shoes along with—

Mr. Green: I am going to object to the content of his communication with the FBI.

119 The Court: Objection sustained.

By Mr. McGarr:

Q. Did you mail these shoes then to the laboratory in Washington?

By the Witness:

A. I didn't mail them personally. They were mailed though.

Mr. Green: I object to that and ask that it go out.

The Court: Sir?

Mr. Green: I object to that answer as a conclusion. He didn't mail them.

The Court: The motion is allowed.

By Mr. McGarr:

Q. Did you package them?

By the Witness:

A. Yes, I packaged them.

Q. Did you direct anyone to mail them?

A. Yes, sir.

Q. I show you a pill box marked Government Exhibit 3 for identification, and ask you if you have ever seen that before?

Mr. Green: Your Honor, there will be an objection
120 to that. That matter has been covered already this morning.

The Court: I thought it had.

Mr. Green: I object to it being presented at this time and continue to be repeated. It is objectionable.

Mr. McGarr: I will withdraw the question then, your Honor.

(Question withdrawn)

By Mr. McGarr:

Q. I show you a package of films containing—

Mr. Green: May we have the identification number of that, please?

The Court: Isn't it No. 4?

Mr. McGarr: Well, there is some confusion. I thought it was No. 4, but now I am not positive.

I will ask him this:

By Mr. McGarr:

Q. At the time you sent these shoes to Washington, did you send anything else?

Mr. Green: I object to that. The witness has not said he sent these shoes to Washington.

The Court: No.

121 By Mr. McGarr:

Q. At the time you packaged these shoes for

mailing, did you at the same time package anything else for mailing?

By the Witness:

A. I did.

Q. What else did you package at that time?

A. I packaged a small box, a pill box containing—

Q. Well, beside the pill box, what else, if anything?

A. Eleven negatives; photographic negatives.

Mr. Green: If the Court please, may we have the identification numbers of these objects?

The Court: He said there was some confusion as to the number part.

Mr. Green: I think we should get it straightened out. It shouldn't take us long.

The Court: Do you have the number?

Mr. McGarr: Yes, sir.

By Mr. McGarr:

Q. I show you this package of photographic negatives marked for identification Government Exhibit 4, and 122 I will ask you if you have ever seen that before?

By the Witness:

A. I have seen these negatives before.

Q. Are those the negatives you testified you packaged on the same occasion that you packaged the shoes?

A. Yes, sir.

Q. Did you direct some person to mail those to Washington?

A. Yes, sir.

Q. Calling your attention to January 19, 1956, were you in the vicinity of the Pioneer Bank on that day?

A. I was, sir.

Q. Where is that bank located?

A. On West North Avenue. I think it is in the 4000 block.

Q. And what, if anything, unusual occurred at that time and at that place?

A. A safe—

Mr. Green: If the Court please, there will be an objection at this point and I would like to be heard on it.

123 The Court: All right, the jury may take a recess.

(Whereupon the following took place outside of the presence and hearing of the jury.)

Mr. Green: If the Court please, under the law where a motion to suppress the evidence has been made prior to trial, and has been determined adversely to the moveant as it has been in this case, the law requires that that motion be renewed upon trial and an objection be made. Usually such an objection is merely perfunctory for the purpose of preserving the record. In this case this objection now being made to the material that was found in the box at the Pioneer Bank is not being made in a perfunctory way, but it is being very seriously urged to this Court.

In the briefs which were submitted to this Court in support of and in opposition to such a motion, it is the feeling of the defendant that the Court's adverse ruling was prompted solely and could have been prompted solely

124 because of a footnote contained in the Brinegar decision, a 1949 Supreme Court decision, 338 U.S. 161, which states that the Grau decision which is the decision which was relied upon by the defendant, has never been used before or since in such a broad application, indicating that the Grau decision is no longer the law.

To review briefly the situation that we have before us, the affidavit which was made for this warrant, and which incidentally, was issued by your Honor and not by the Commissioner, states that—

May I have that warrant?

It states that Don Schiavone—I am reading the affidavit—

"That Don Schiavone, also known as Nicholas Guido, has been identified as possessing and passing currency stolen from said bank—"

Referring to the Maywood Bank:

"—and that information derived from an informer
125 is that the proceeds of the above bank robbery are in said safety deposit box; further, a box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido."

Now, I don't think there can be any quarrel on the part of the Government but what this is an information statement. It is clearly an information statement. I don't believe that any representation could be made to the contrary.

Now, I also feel that the Government will concede that an information application for a warrant is such as was universal and has been thoroughly in every decided case, and I submit to Mr. McGarr if he has any authority to the contrary, it is authority of which the defense is not aware, and it is not sufficient to support a search warrant. Both the constitution and the application of the rule of Federal Civil Procedure says that the application
126 must be made by affidavit. In other words, we have to have something upon which we can predicate perjury.

The statement that someone told him is nothing upon which perjury might be predicated. Your Honor, I am not speaking of the quantum of proof. It is not our purpose to argue to this Court that the application for a search warrant may make out a case. I think it need not even make out a probable cause case. But it must be an affidavit. It must be something that we can come into the court on if false, and under the constitution and under the applicable rules say, "We have an affidavit."

To state that someone told me, or someone told me something as true, does not supply the requirement.

Now, under the Grau case which is a decision of the Supreme Court of the United States directly in point, The Supreme Court went very far. I quote:

"A search warrant may issue only upon evidence
127 which would be competent in the trial of the offense before a jury." Citing the Giles case, and the Wagner case. And as far as the second proposition is concerned, as to the quantum of proof. The Supreme Court went very far.

"A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury—"

Citing the Giles case and the Wagner case, and as far as the second proposition, as far as the quantum of proof it would lead a man of prudence and caution to believe that an offense has been committed.

The language:

"A search warrant may issue only upon the evidence which would be competent in the trial of the offense before a jury"

And clearly, a statement that someone told me such and such would not so admissible, as we have in this warrant, was condemned but not overruled in the
128 Brinegar case which, I say, is the only decision which is to the contrary.

Now, in the Brinegar case which was cited by the Government, the Court said by way of a footnote:

"While not overruling the Grau case that the language which was relied upon—"

And this is not isolated language.

"—of the Grau decision was said only by way of dictum."

Said the Supreme Court in the Brinegar case:

"A search warrant may issue only for the evidence which may be competent at the trial of the offense before a jury."

Said the Supreme Court by the way of a footnote:

"For this proposition there was no authority in the decision of this court."

The Wagner case relies solely upon Giles, the other case cited in Giles, and it holds warrant bad which is issued on the basis of hearsay and conclusions.

129 "The Grau dictim—"

Says the Supreme Court—

"—has constantly been applied or treated as a dictum by Courts of Appeal and District Courts."

Citing a great number of cases where the law is held to be that a search warrant will issue only upon an affidavit containing language which would be competent to be heard by a jury.

In other words, in this Court's action in overruling this motion, we feel that your Honor must have belief that the Grau case to have been overruled by the footnote in the Brinegar case. All be it, if the Supreme Court had intended to so overrule that decision, the Grau decision it, would have succinctly so stated.

In other words, this Court must have felt that the Grau decision was no longer the law since the time your Honor has decided that motion.

In the case of United States vs. Gallegos, 237 Fed. 130 2d, beginning at page 694, the Circuit Court of Appeals for the 10th Circuit has again reiterated the law in the Grau case. That decision was since the decision of this Court in overruling the motion to suppress. That decision in the Gallegos case was published in only February of this year, 1957, and it could not have been in the consideration of this Court at that time.

Now, I will read briefly from the Gallegos case:

"On December 15, 1955, the sheriff of Lincoln County, New Mexico, received an anonymous tip to the effect that three men driving a blue 1955 Ford automobile would soon be through his area and were unlawfully in possession of narcotics. With the active cooperation of the New Mexico State Police, road blocks were established and in a short time a blue 1955 Ford containing three men was stopped."

Continuing on:

"The car was being driven by one Olguin and de-
131 fendants were in the car. A search of the car and the persons of the occupants revealed nothing. Nevertheless, Olguin and defendants were placed in custody and a more thorough search of the car the next day uncovered a quantity of heroin secreted behind the kick panel of the car. The New Mexico officers conducted all of their activities without warrants of any kind—"

Although they had been told that the car contained heroin as, I think, Mr. Spencer had been told, that the box in question in this case contained the proceeds of a bank.

Continuing again:

"—because, as one officer frankly stated at the trial, 'I didn't get a search warrant because I didn't believe I had sufficient grounds to obtain a search warrant'."

Mind you, your Honor, they had information that was given to them by an informer that narcotics were in
132 the car. Says the Court of Appeals:

"He was most certainly right in that observation."

Citing Worthington vs. United States, 166 Fed. 2d, 557. Grau vs. United States, 287 U.S. 124.

So at least since your Honor's decision on that motion to suppress, the United States Circuit Court of Appeals

for the 10th Circuit clearly regards the Grau case as still being the law of the land.

I think the applicability of the rule, and I might say that our State Constitution is exactly similar to our Federal Constitution in that regard, in requiring applications for a warrant be supported by an affidavit, and it has been very fortunately stated, and as I say, the basic constitutional language is identical, in the case of People vs. Elias, 316 Ill. For the record I would like to read a rather extended portion of the Elias decision:

"The language of section 6 of article 2 of our con-
133 stitution provides exactly the same protection whether the warrant be for the search of a house or the seizure of property or for the search or seizure of a person. This court has held repeatedly that a complaint or information charging an offense on information and belief does not authorize the issuance of a warrant for the arrest of a person."

Citing a great number of cases.

"Nor for the issuance of a warrant for the seizure of property."

Citing cases.

"The affidavit must show on its face that the facts stated therein are within the knowledge of the affiant,—"

Citing cases. This negative says that the facts are within the knowledge of an unnamed informer.

"—or the affidavit must be in positive terms notwithstanding the knowledge of the facts stated in the affidavit may have come to the affiant from a confession of the accused or from some other source which enables
134 the affiant to state positively that the allegations of the affidavit are true.

"In Lippman vs. People, supra, this court said:

'It has been uniformly held, wherever the question has arisen under a statute or constitution containing

such provision, that the oath or affirmation must show probable cause arising from facts within the knowledge of affiant and must exhibit the facts upon which the belief is based, and that his mere belief is not sufficient'."

Citing two United States Court cases, United States vs. Tureaud, and Johnson vs. United States.

"The constitutional provisions on this subject had their origin in the abuse of executive authority and their design is to substitute judicial discretion for arbitrary power so that the security of the citizen
135 and his property shall not be at the mercy of individuals or officers. The general statute authorizing search warrants contained in the Criminal Code fully recognizes this rule—"

As I say parenthetically does Rule 41 of the Federal Rules of Criminal Procedure.

"—by the requirement that the judge of justice of peace shall be satisfied that there is reasonable cause for the belief of the affiant before he shall issue his warrant. Wherever a statute requires probable cause supported by oath or affirmation, the complaint must set up facts and cannot rest on mere belief, which will not satisfy the requirement."

Citing cases.

"A search warrant can only be granted after a showing made before a magistrate under oath that a crime has been committed, and the law, in requiring a showing of probable cause, supported by affidavit,
136 intends that facts shall be stated which shall satisfy the magistrate that suspicion is well-founded. The mere expression of opinion, under oath, is no ground for the warrant, except as the facts justify it. This decision has been cited throughout the United States as a leading case on the construction of constitutional

provisions similar to the one now under consideration. If the accuser were on the witness stand he would not be permitted to testify to mere hearsay, and he certainly should be equally restricted in an ex parte affidavit where he is subjected to no cross examination."

Citing cases.

"In United States vs. Giles, 284 Fed. 208—"

A Federal Case.

"—the circuit court of appeals holds that:

'it should have affirmatively appeared that he (affiant) had personal knowledge of facts compe-
137 tent for a jury to consider, and the facts, and not his conclusion from the facts, should have been before the commissioner,' who issued the search warrant. Lord Coke, in the Institutes, • • • referring to search warrants, says:—"

Well, I will skip over Lord Coke's observations, and I will continue with the language of the Supreme Court:

"A charge is not 'supported by affidavit' unless it is supported by documentary evidence or testimony under oath competent to establish the charge in a court. 'Charges are not verified by an affidavit that somebody is informed and believes they are true. This is mere evasion of the law. The most improbable stories may be believed of anyone and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man • • • who will swear that he had been informed and believes
138 in his guilt. It is easy to tell falsehoods, and those who are least fitted to judge of their credibility are generally the persons who will believe them because they are told. But to substantiate charges within the meaning of the law evidence is required, and not mere suspicion or information or beliefs.' • • •

"If no warrant shall issue but upon probable cause—"

This is all quoted from the Giles case, quoted by our Supreme Court.

"—cause supported by oath or affirmation, the support must be something more than hearsay or belief. Where a person or officer states upon oath 'that the several allegations and facts set forth in the foregoing information are true, as he has been informed and and verily believes,' he may have no knowledge of or information upon the subject except mere hearsay and yet can conscientiously make such declaration. A
139 complaint thus verified proves nothing. It does not state facts, but only the affiant's hearsay knowledge and belief. It is not a complaint and information or declaration supported by an oath or affirmation. At common law an information might be filed under the English practice against persons charged with misdemeanors, yet no rule was granted in regard to such cases except upon evidence as would uncontradicted make out the offenses beyond a doubt. * * * If a warrant in the first instance may issue upon a mere hearsay or belief, then all the guards of the common law and of the bill of rights of our own constitution to protect the liberty and property of the citizen against arbitrary power are swept away. There is no necessity of going so far and the constitution warrants no such conclusion. The expressions of the bill of rights are very plain and very comprehensive and cannot be misunderstood. The oath or affirmation
140 of a complaint or information upon which a defendant is arrested in the first instance must set forth that the allegations and facts therein contained are true." Citing cases.

"The complaint filed in this case does not charge that Anton Elias, or any other person, has committed a crime. It merely states that affiant believes that intoxicating liquors are to be found in a building occupied, owned or controlled by Elias. The fact that Elias owned the building and that intoxicating liquor was kept in it would not subject him to the penalties of the law unless the liquors were kept there with his knowledge for some prohibited purpose. Notwithstanding the failure of the complaint to charge any person with a crime, a general warrant was issued on the filing of the complaint," et cetera.

"The State's attorney in the instant case did not
141 state in the complaint filed by him any fact as a basis for his belief that intoxicating liquors were then unlawfully kept in a building described that subjected him to the penalties of perjury in the event his information was false."

I might say that in the Elias case they named the informer. They didn't here.

"Grant that Ray Bullerman did inform him that he bought intoxicating liquor from Anton Elias in the premises described. If this information was false no person could be persecuted for perjury."

We don't even know who informed Mr. Spencer. At least in the Elias case they named the informer.

"Bullerman did not give the information under oath and he was therefore subject to no penalty if the information given by him was false. The State's attorney cannot be prosecuted for what he believes, no matter how insufficient or false the basis of his belief
142 From this analysis it seems clear that Elias was subjected to a search and seizure in direct violation of the constitution. If the State's attorney or other

officer cannot make a verification of facts then the complaint should be supported by the affidavit of someone who can."

In other words, if the informer who advised Mr. Spencer that this box contained the proceeds of a crime, knew that, he is the individual who should have made the affidavit, not Mr. Spencer. Where can it be adversely predicated upon such an affidavit? It cannot. This is simply not an affidavit.

"If the officer can get information that convinces him that a crime has been committed he can obtain the affidavit required by the constitution. If he cannot obtain the sworn testimony to secure the arrest of the accused and the seizure of the property of the
143 accused, how can he get the sworn testimony to convict the accused after he is arrested?" And so on.

Incidentally, I think in the Elias case they went further to say that by affidavit the informant, Ray Bullerman, was a reliable person. We don't even know who the person was in this case.

In other words, your Honor, I think it has been the undisputed rule that a hearsay warrant is not a good warrant until we have the footnote in the Brinegar case; the footnote which was cited by the Government in its brief, and the footnote which, I believe, the defense feels must necessarily have been relied upon by the Court in dealing that the Grau decision had been overruled. That the Grau decision is still the law seems to be recognized as recently as February, 1957, in the case of United States *v.* Gallegos which was not and could not have been before your Honor at the time.

As I stated, as a rule these objections are made in
144 a perfunctory fashion for the purpose of preservation of a record, and this objection is not being so

made. The defense feels that had your Honor had the advantage of the Gallegos decision; the event of the motion to suppress was previously accepted by the court upon the briefs it would not have been the same.

Thank you.

Mr. McGarr: May I reply briefly, your Honor?

The Court: Yes, sir.

Mr. McGarr: The Government has never contended that a search warrant may be predicated solely upon the information obtained from an anonymous informer. I must say for the record that the anonymous informer in this case is not known to the Government and could not be produced in any event.

But we need but examine the affidavit for the search warrant to discover that we have abided by the traditional law that anonymous information may be coupled with known corroborate facts and produced on a highly
145 adequate basis for the issuance of a search warrant.

The form used in the affidavit for a search warrant, signed by Roswell Spencer, Special Agent of the FBI, sworn to and subscribed in the presence of your Honor, indicates:

"The undersigned being duly sworn deposes and says:

"That he has reason to believe—"

Then it goes on and indicates the proceeds of the bank and so forth. The facts that it tends to establish are these, that Don Schiavone also known as Nicholas Guido has been identified as possessing and passing currency from said bank, stolen from said bank.

That isn't information derived from an informer. That is a fact.

And that information derived from an informer is that the proceeds of the above bank robbery are in said safety deposit box.

That is the information for the faceless informer.
146 Further, more facts:

"Further, a box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido."

There are three essential allegations in there. Two of those are being sworn to by Mr. Spencer as facts, which he has reason to believe, and one is being sworn to as information derived from an anonymous informant.

The points raised by Mr. Green are substantially the same—I should say, identical to the points already litigated before this court in this matter with the briefs submitted. The only difference is the one additional fact, that the 10th Circuit has relied upon the Grau case which seems to be discredited by the Supreme Court. I have before me the memorandum which your Honor considered,

submitted by the Government, citing a dozen or more
147 cases without any exclusive reliance on the Grau case;

citing the law as it is, that it is within the discretion of this Court a search warrant may be issued upon the grounds that there is probable cause, and in dealing with probable cause the Brinegar case says:

"—we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act. The standard of proof is accordingly corelative to what must be proved."

And if the argument of Mr. Green is based, as I assume it is, on the assumption that the entire factual basis of the issues of this search warrant is information from an anonymous informer, I disagree very readily with that. There are two facts known to the affiant upon which he could be tried for perjury if they were for the jury's

statement, and they are facts corroborative of a single
fact which is as the warrant sets forth, came from an
148 anonymous source. This was analyzed, raised and
argued in the briefs, and I submit that the Grau case which is relied upon by the defendant is still dictum, the section of it relied on, is still criticized by the Supreme Court, and the only fact before your Honor, not previously before your Honor, is that that case has been cited by the 10th Circuit in a subsequent decision, none of which changes the fundamental legal principle that this is a valid search warrant, not based exclusively on a non-essential nature.

Thank you.

Mr. Green: I could be very brief, your Honor.

The Court: Yes.

Mr. Green: In Mr. McGarr's reply I think he made two points:

The first point was that you need not have in order to obtain a search warrant, you need not make out an iron-clad case. That is readily admitted by us. That goes
to the quantum of proof. You only need to make some
149 kind of a showing which a proper and reasonable man
believes a bases for a search warrant exists, but such a showing—and this is our whole point, must be made by competent evidence, and not by mere hearsay.

Moreover, we speak of the Grau decision as being the lone sole expression of that effect that has ever been in the courts. Quite to the contrary, the Grau decision has been repeated and repeated in at least 20 cases as representing the law.

More interesting, however, was the observation of the United States Attorney that our complaint that the warrant was based upon information and belief is not so. In effect, he said only in part. He said there are three

things which are stated by Mr. Spencer, Mr. Spencer being the applicant and he would be subject to perjury if things he said were false.

He said, first, that Don Schiavone also known as
150 Nicholas Guido has been identified as possessing and passing currency he said were stolen from the said bank. That is one point.

Now, I say in the first place, replying to that aspect of the allegation, there has been identified and it shows on its face that even that is hearsay. But let us go further, and let us concede that Mr. Spencer would make an affidavit, "that I, Roswell Spencer, on the 4th day of November, 1955 saw Don Schiavone rob the Maywood Bank and saw him take therefrom a great amount of currency."

Even if it would contain such a positive statement of fact it would not give an excuse or warrant for the issuance of a search warrant to search his box. Even if it was that definite.

Rule 41(b) of the Federal Rules of Criminal Procedure says:

"A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws
151 of the United States;—"

What does the fact that Mr. Don Schiavone, also known as Nicholas Guido, has passed some money which was stolen from a bank, how does that relate in any way to the property which is contained in the safety deposit vault which is the object of this search?

Therefore, I say, in so far as the first of the three things is concerned, which are stated by Mr. McGarr to be contained in this affidavit, No. 1, it shows upon its face it is upon information and belief, as it has been identified.

No. 2, even if that was not upon information and belief, it would not give any authority for a search of the box.

Passing now to the next of three things contained, according to the United States Attorney, in the affidavit, is, and I read:

"And that information derived from an informer is that the proceeds of the above bank robbery are in said safety deposit box;—"

152 That is the only thing we are interested in, what is in the box. Under Rule 41(a) of the Rules of Federal Criminal Procedure, would be the stolen property taken, or embezzled under the laws of the United States, that we are trying to get by the warrant. That is the only thing. That is the thing which is definitely and clearly stated to be upon information derived from an unnamed informer.

Finally, and this is a matter of interpretation, the third thing, further its to the box under the name of Don Schiavone. It says:

"A box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido."

It is our contention, and our contention is bolstered by the rules of strict construction which should be applied to such matters, that that is modified by that information

153 derived from an informer is to this effect, further that so and so. I say that is a point of information and belief.

But again, I say, even had that been stated definitely, that a man by the name of Don Schiavone had recently rented a box in a bank, I would say even if that had been stated definitely, and that Roswell Spencer would state under oath that he saw it, there would be no question as to the quantum of proof, although we are not speaking of quantum; that that would not suffice because the grounds

for issuance of a warrant must be that you are going to find therein the stolen or embezzled property which was taken contrary to the laws of the United States.

I would, therefore, by way of conclusion say, No. 1, in the Brinegar case which merely criticizes but does not overrule the Grau decision, we have no new law made. The Grau decision is supported by a wealth of cases re-
iterating the fundamental principle that a hearsay
154 warrant cannot be obtained. The Grau decision was repeated as being the law of the land since your Honor has passed upon the application. I said that in the first place, and I reply to his argument of the Government that this is not an information affidavit by an analysis showing that the only thing we are definitely interested in is that which is definitely stated to be on information derived from an unnamed informer.

The Court: Well, in glancing at this affidavit upon which the search warrant was issued, it is quite apparent that it was represented that a robbery of the Maywood Proviso State Bank had occurred on or about November 4, 1955.

Then it is also quite apparent and it is quite plain that the affiant states:

> "That Don Schiavone, also known as Nicholas Guido, has been identified as possessing and passing currency stolen from said bank and that information derived from an informer is that the proceeds of the above bank property are in said safety deposit box;
155 Then there is a semi-colon.
> "further, a box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido."

That is the end of the quotation.

Now, if we eliminate from that statement that part of it which states:

"—and that information derived from an informer is that the proceeds of the above bank robbery are in said Safety Deposit Box;—"

We have this, sworn to by Mr. Spencer.

"That Don Schiavone, also known as Nicholas Guido, has been identified as possessing and passing currency stolen from said bank—"

And further:

"—a box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido."

156 Now, the only question is, did I at the time that affidavit was presented to me have probable cause to believe that a crime had been committed and that evidence of the crime would be found in the Safety Deposit Box described in the affidavit? I think I did have sufficient reason to believe that probable cause existed which would authorize the issuance of that sort of a search warrant. Therefore, your motion at this time is overruled.

We will take a recess for the reporter.

You may step down too, Mr. Witness.

(Whereupon a short recess herein was taken, after which the following further proceedings were had:)

The Court: You may proceed.

(Thereupon the following further proceedings were had herein, in the presence and hearing of the jury:)

By Mr. McGarr:

Q. Calling your attention, Mr. Hunter, to January 19,

1956, were you in the Pioneer Bank on that date?

157 By the Witness:

A. I was, sir.

Q. Was there anyone with you?

A. Special Agent Ross Spencer, Special Agent Leo Pedrotty.

Q. Did you or did one of the other Agents have a search warrant in your possession at that time?

A. Yes, sir.

Q. Did you open, or view the opening of a safety deposit box in the bank on that day?

A. I viewed the opening.

Q. Do you recall the number of that box?

A. As close as I can recall it, it was 6728.

Q. What if anything was taken from that box by you or in your presence?

A. $3,150.

Mr. McGarr: I would like to have this marked as Government's Exhibit 13 for identification.

(Said currency was thereupon marked Government's Exhibit 13 for identification.)

By Mr. McGarr:

Q. I show you, Mr. Hunter, an envelope marked

158 for identification as Government's Exhibit 13, containing five packets of United States currency in various denominations, and ask you if you have seen that currency before?

By the Witness:

A. Yes, sir.

Mr. Gorman: We will object to the witness taking anything from his pocket.

By Mr. McGarr:

Q. Can you answer the question?

Well, let me ask you this:

When the money was removed from the safety deposit box what, if you know, was done with it?

By the Witness:

A. It was first counted, and then after it was counted I reported the serial numbers of each bill.

Q. In recording the serial numbers did you find any bills with serial numbers in numerical sequence?

A. I found five $10 bills that ran in sequence or consecutive numbering, except for one number that was missing.

Q. Can you locate those five bills among the 159 currency we have just had identified as Government's Exhibit 13?

A. Yes, sir.

Q. Would you read the serial numbers of those five bills, please?

A. Yes, sir.

A. $10 Federal Reserve Note, Serial No. G-97753056C.

The next one is Serial No. G-97753058C.

The next one is G-97753059C.

The next one is G-97753060C.

The next one is G-97753061C.

Q. Did you find among the bills taken from the safety deposit box, other than the ones you have just testified to, any bills with unusual markings or writing on them?

Mr. Green: I object to that as calling for a comparison.

The Court: Objection sustained.

He can state what characterizations there might be on the other bills.

By Mr. McGarr:

Q. Did you find among the bills taken from this box any bills with any markings upon them?

160 By the Witness:

A. I did, sir.

Q. What markings did you find on those bills?

A. Well, the bills, some of them were—

Mr. Green: I think the bills themselves would be the best evidence.

Mr. McGarr: He is just identifying the type of markings and I will ask him that.

Mr. Green: Very well.

By Mr. McGarr:

Q. What type of markings did you find on some of these bills?

By the Witness:

A. I found some bills with figures written on them.

I found several other bills with stamps, stamp impressions on them.

Q. Are you able to select from the bills identified as Government's Exhibit 13 those with figures written upon them?

Here (indicating) is a $50 bill, a Federal Reserve Note.

Mr. Green: Is this one group exhibit?

161 Mr. McGarr: Yes, sir.

Mr. Green: I would suggest that we have some way of marking the individual bills.

Mr. McGarr: I was going to have them marked with red pencil but there are only four of them.

Mr. Green: Very well.

By the Witness:

A. This (indicating) is a $50 Federal Reserve Note, Serial No. B-03091066-A, which has the penciled impression, "27—"

Mr. Green: I object to that. I think the bill would be the best evidence.

Mr. McGarr: I think he might indicate the type of markings on it.

The Court: I think he might do that. The bill of course, will be the best evidence.

By the Witness:

A. (Continuing) And this bill has a penciled notation on it. Federal Reserve Note, G-02617652A. It has a penciled notation on it.

Federal Reserve Note J-01806291-A. It has a pencil 162 notation on it.

Federal Reserve Note G-01254879A. It has a pencil notation on it.

By Mr. McGarr:

Q. What are the denominations of the four bills you have just identified?

By the Witness:

A. $50 bills.

Q. Were those $50 bills amongst the currency you took from the safety deposit box at the Pioneer Bank?

A. Yes, sir.

Q. What else if anything did you do at the Pioneer Bank?

A. After counting this money we then recorded the serial numbers of the bills, and I took the money back to the office with me.

Q. Before you left the bank, was there any other activity there, or did you do anything else?

A. I don't recall.

Q. Did you take any photographs at the bank?

A. I took photographs at the bank but that was not on this day.

Q. On any subsequent day did you visit the Pio-
163 neer Bank?

A. I did, sir.

Q. On what date, or approximately what date was that, if you recall?

A. I don't recall specifically. I think it might have been January 25th. I am not positive as to that date.

Q. What if anything did you do on the occasion of your visit to the bank then?

A. On that date I photographed the application card for this safety deposit box, and I photographed two entry tickets connected with this box.

Q. What if anything did you do with these photographs?

A. I brought the photographs back to our office. I developed the film, and I sent the negatives to our laboratory in Washington, D. C.

Mr. McGarr: I would like to have these three documents marked as Government's Exhibits 14, 14-A and 14-B for identification.

(Said documents were thereupon respectively
164 marked Government's Exhibits 14, 14-A and 14-B for identification.)

By Mr. McGarr:

Q. I show you, Mr. Hunter, Government's Exhibits marked for identification as Nos. 14, 14-A and 14-B, and I will ask you if you have ever seen these prior to this occasion?

By the Witness:

A. I have, sir.

Q. Where was it you saw them?

A. I first saw these in the office of Winter & Hirsch Loan Company.

Q. Where is that located, if you recall?

A. As I recall, 1842 South Michigan Avenue.

Q. About when was that?

A. As I recall, it was about April 19, 1956.

Q. Did you take those documents with you from the Winter & Hirsch Company?

A. I did, sir.

Q. What if anything did you do with them?

A. I took these back to the office, and I had photostatic copies made of them. I maintained the photostatic copies. I sent the originals to our FBI laboratory in Washington.

165 Mr. McGarr: No further questions.

The Court: Cross examine.

Oh, it is so close to adjournment time, wouldn't it be better for you to wait?

Mr. Green: It would be perfectly all right with us, your Honor.

The Court: Yes. Then you could assemble your material and be better organized.

Mr. Green: Yes, sir.

The Court: We will recess until Monday morning at ten o'clock.

(Whereupon the further hearing in the above-entitled matter was continued until 10:00 a.m. Monday, April 29, 1957.)

166

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

Before Judge Igoe and a Jury,
Monday, April 29, 1957,
10:00 o'clock a. m.

Trial resumed pursuant to adjournment.

Present:

Same as before.

And Thereupon, the following further proceedings were had herein, out of the presence and hearing of the jury:

167 The Clerk: U. S. v. Guido. Case on trial.

The Marshal: The attorneys would like to talk to your Honor before bringing in the jury.

The Court: All right.

Before we get down to that, I have got to go to a funeral this afternoon. We will just work this morning. I have to go to Mr. Wescott's funeral.

What was it? You had some other matter you wanted to present?

Mr. Green: Yes, your Honor.

Since the adjournment of court last Friday there has occurred in Chicago a very unfortunate occurrence. The Bank of Lincolnwood here in the city was robbed Friday night by a group of robbers employing the modus operandi, on which I know there is no dispute here, is identical in every respect with the modus operandi which I will describe as having been the modus operandi of the present robbery.

That crime that was committed last Friday was the subject of a great deal of widespread publicity throughout Chicago. I exhibit the Chicago Daily Tribune fea-

168 turing the robbery as the lead article on the front page.

Likewise, the Chicago Daily Times, also of April 27th, similarly featuring the robbery exclusively on the front page.

More unfortunately, however, the National Broadcasting Company over a midwest television outlet, over the Station WNBQ in Chicago, Jim Hurlbut's newscast, where he stated that the robbery was committed by members of the so-called "Cowboy Gang," which would employ a similar modus operandi for the various bank rob-

beries. And then continuing, that it was speculated that the robbery was for the purpose of raising funds for the defense of one of its members.

I won't undertake to repeat the exact language of that broadcast. I have subpoenaed this morning Mr. Huntley, the head of the News Bureau of the National Broadcasting Company, who has with him that transcript which I wish to have introduced.

It is, of course, impossible for me or anyone else to state whether that reached the attention of the jurors.
169 I think, however, it would be a matter of common knowledge that a claim which has created such a widespread publicity, and which was similar to the case which is now being tried by these twelve jurors, would certainly have heard, or had related to some member of that jury the content of that broadcast.

I might say parenthetically that no less than six and probably ten persons reported it to me. I imagine the experience of the jurors was the same.

This is not a case, your Honor, where we are moving for a continuance because of the prejudice engendered in a community of jurors which is the common application because of newspaper articles. This is a case where we have already selected tweleve persons in the trial of a bank robbery case, and where we have a similar offense committed, and where the speculation indulged in that it was committed for the purpose of raising defense funds for the man on trial.

I would like to say that I hope this court knows that neither Mr. Gorman or myself will defer to any-
170 one the consideration we have for this or any other court's time. We have already invested a day and a half in the trial of this matter. But I think it would be the sheerest fiction were we to say now that the release has not prejudiced us. If any member of that

jury heard such a speculation, we do not have a free and impartial jury.

I think that in the language of the Krilovich case to indulge in anything else to inquire of the jury whether they be prejudiced would be simply to give lip service to a fiction, as stated by the Supreme Court, and as every practicing lawyer knows. We don't have a trial by jury any more.

I most respectfully move this court to withdraw a juror and declare a mistrial.

I would like to call Mr. Hagan and have him introduce the news release in question.

Mr. Hagan, will you take the stand, please.

Mr. Chester Hagan: Yes, sir.

The Court: Will you raise your right hand and be sworn, please.

171 Mr. Hagan: Yes, sir.

(Witness duly sworn.)

CHESTER HAGAN, called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Green.

Q. Will you please state your name?

By The Witness:

A. Chester Hagan.

Q. Your address?

A. 451 Wrightwood.

Q. What is your business or occupation, sir?

A. Manager of news for the National Broadcasting Company, Central Division.

Q. Does the National Broadcasting Company, Central Division, have a television outlet in the city of Chicago?

A. It does.

Q. What is that television outlet?

A. WNBQ.

172 Q. Do you have with you in response to a subpoena duces tecum served upon your corporation the transcript of a telecast that was delivered over your facilities in the Chicago outlet on or about the hour of 11:00 o'clock of last Friday night, April 26?

A. I do, except, sir, there is one thing I think I should point out. This was a radio broadcast, not a television broadcast.

Q. This was not a telecast?

A. No, sir.

Q. Who was this by?

A. James Hurlbut.

Q. James Hurlbut?

A. Yes, sir.

Q. And that broadcast went out over the facilities of WNBQ, and any other stations, as well?

A. WMAQ.

Q. WMAQ?

A. Yes, sir. It was a radio broadcast.

Q. And any other stations as well?

A. Yes.

Q. What other stations?

A. The stations involved in the split network of
173 the National Broadcasting Company, which would include in this case, the case of this broadcast, the Central Mountain and Pacific Time stations; not the Eastern Time stations.

Q. Did a portion of that broadcast relate to a robbery of the Lincolnwood Bank?

A. Yes, it did.

Q. Do you have that portion with you?

A. I do.

Q. Will you please read that into the record?

First, you might give it to me and I will have it properly identified.

A. Yes, sir.

(Whereupon the witness handed a document to counsel.)

Mr. Green: I would like to have this marked as Defendant's Exhibit 1 for identification.

(Whereupon said document was marked Defendant's Exhibit 1 for identification.)

By Mr. Green:

Q. I show you Defendant's Exhibit 1 for identification, and ask you whether that is a true and cor-
174 rect transcript of the broadcast so delivered by Mr. James Hurlbut?

A. It is, sir.

Q. And that was retained by you in your files as a true and correct copy thereof?

A. It is.

Mr. Green: Do you want to ask any questions?

Mr. McGarr: Why don't you read it?

Mr. Green: It has been suggested that I read this:

"Lincolnwood, Illinois.

"A lightning raid by the so-called 'Cowboy Gang' of bank robbers on a suburban Chicago bank failed to net the usual high figure the mob has taken in previous robberies of other suburban financial institutions. The holdup of the Lincolnwood Bank during the height of the evening shopping hour cost the bank $12,000. But it was staged in the same slam-bang fashion which has given the mob its name. Three of
175 the gunmen raced in the front door yelling and

screaming, brandishing weapons, including a sawed-off shotgun. Their faces were covered by cloth hoods. The customers and employes were made to lie on the floor as one of the bandits leaped to the counter, scooped up currency and stuffed it in a bag. Then they all ran out and leaped into a waiting automobile and raced off.

"It has been speculated that the raid may have been staged in order to raise the defense fund for an alleged member of a mob who is under indictment in a previous robbery."

I would also like to have the Chicago Daily Times news item marked Defendant's Exhibit 2, and the Tribune as Defendant's Exhibit 3.

(Said documents were respectively marked Defendant's Exhibit 2 and 3 for identification.)

176 Mr. Green: I can only repeat it would be the natural and inevitable consequence of such a publicity.

That is all, Mr. Hagan.

Mr. McGarr: I have no cross examination.

(Witness excused.)

Mr. McGarr: First, may I suggest, your Honor, that the contents of this broadcast made no reference to the defendant Guido by name, or even to a person who is on trial for bank robbery. It merely refers to a man who is under indictment. "It has been speculated that the raid may have been staged in order to raise the defense fund for an alleged member of a mob who is under indictment in a previous robbery."

Mr. Green has pointed out and it is, of course, a fact that the modus operandi of the Lincolnwood Bank robbery is quite similar to the one that has been presented by

virtue of the witnesses in this trial. That may or may
177 not give rise to speculation that the same persons did
the job, since there are a very limited number of ways, I suppose, that a group can rob a bank. In any event, if that speculation does arise in the minds of the public or the newscasters or the jury or the court, it is a natural speculation but not necessarily one prejudicial. To assume that it is prejudicial is to assume that if a person is on trial in a similar crime as performing and giving publicity while he is on trial, we will invariably have a mistrial. Or in other words, it would almost be to the advantage of the individual on trial to perpetrate a similar crime and thus prevent his ever being brought to justice.

But the fact that there was a Lincolnwood Bank robbery, and the fact that there was a very similar modus operandi here is no basis for a mistrial.

The only issue before the court is whether the jury,
178 one, has heard, first, the news broadcast itself, and
is that news broadcast itself offensive in that it suggests that this particular defendant was involved in that particular crime? I don't think it does with any degree of clarity. I think, actually being familiar as we are with the facts of the Maywood bank robbery because we are involved in the trial Mr. Green, myself and the court may be somewhat more sensitive to this, to the implication of this broadcast than others. But the fact is that when you examine the text, and I would like to hand it up to your Honor to look at it.

(Whereupon counsel handed a document to the court.)

It does not by any necessary implication relate it to the defendant.

Secondly, even assuming that there is something prejudicial in that broadcast, we must determine whether any member of the jury heard it. And assuming that proves
to be a fact that one or more members of the jury
179 heard it, we must next inquire as to whether any
bias has been created in their minds by anything that they heard.

Finally, before the court and the Government and the defense throw away their time and effort that has been thus invested in this trial, I think we can inquire as to whether any bias was created in the minds of any of the jurors who may have heard this that can be cured by an instruction by the court, either as a part of the normal instructions given in this case, or as a special direction to the jury in connection with this broadcast. To disregard any outside information or any speculation from any outside source as to whether Mr. Guido has been involved in this or any other crime.

So, I would suggest that the motion for a mistrial could be denied at this point on the strength of the con-
tent of that article, or if the court does not see fit
180 to do that then an inquiry should be made of the
jury, and I would suggest that even if one or more members of the jury have heard that particular broadcast, that any bias which might have been created in their minds is subject to being cured by proper admonitions from the court.

Mr. Green: Briefly to reply to Mr. McGarr, your Honor, he asked four questions.

He asked, is the broadcast offensive?

To state that the robbery was staged the "Cowboy Gang", which was engaged in a number of bank robberies of suburban banks under a similar modus operandi, and that the robbery, it was speculated was committed in

order to raise funds for the defense of one of its members, and although I concede that it does not mention the defendant by name, I don't see how it could more definitely pin point him in the mind of any thinking person. I just can't follow that argument at all, although I am ready
181 to concede that it doesn't mention Nicholas Guido by name.

Now, to inquire whether the jury has heard it; to inquire whether there was a bias thereby created, and next, as a corollary to attempt to correct that by any instruction would be futile.

Quoting from Delaney, 199 F.2d:

> "No doubt the district judge conscientiously did all he could, both in questions he addressed to the jurors at the time of their selection—

And mind you, your Honor, the Delaney case was a motion for a continuance. It was not a motion for a mistrial after the attention of these twelve people had been riveted by a day and a half of service on this type of an offense.

> "—both in questions he addressed to the jury at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this
182 damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But as stated by Mr. Justice Jackson,—"

who was concurring in the Krulewitch case—

> "'The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction.'"

Citing cases and a Harvard Law Review note.

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes,

that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity. This
183 is particularly true in the determination of issues involving the credibility of witnesses."

184 We have had here a news release which is unquestionably damaging. Any person who heard that broadcast could not be viewed longer as a fair and impartial juror. It was not as to anything that we might introduce in evidence upon this trial. It was as to something entirely separate and apart from that. It was not even as to previous offenses. It was as to an offense which was committed at the very time that this case was on trial with the speculation that it was for the purpose of this case.

I don't think a stronger showing could be made, save, of course, actually naming the man. But the effect is the same.

I don't think Mr. McGarr does seriously argue that the failure to state his name thereby renders this news release innocuous.

Mr. McGarr: May I suggest very briefly to the court that the Delaney case, as we know, is a case involving
185 a national publicity in which the defendants were mentioned by name repeatedly day after day in the press.

There we had a motion for a continuance and not a motion for a mistrial, and I doubt that the language quoted by counsel was applicable.

As to the Krilovich case, we are referring to some dictum in that case by Justice Jackson, and the instruction, his assumption that the instruction to the jury to exclude from the minds of the jurors certain evidence relative to certain people cannot be assumed valid is obviously contrary to the law and contrary to the fact that every day

the courts indulge in the presumption that by proper instruction to the jury the jury can be told to disregard some fact that has come to their attention, either as to all of the defendants or as to certain defendants. There is no other way to work the judicial mechanism.

I think the only issue before the court here is
186 whether the jury has been prejudiced or biased was created by reference to this particular news broadcast, and the news broadcast itself does not necessarily lead to that inference. What has gone on in the mind of the jury cannot be determined by questioning them on that point.

The Court: I think the jury will have to be sent for and we will have to question them to see what if any effects this broadcast and these news items have had upon them.

Bring the jury in.

Mr. Green: I raise this question, your Honor, for the court and jury as to whether or not such an interrogation might do more harm than good?

The Court: If you don't want me to make it, I won't make it.

Mr. Green: Excuse me, your Honor. May I confer with Mr. Gorman?

The Court: Yes, sir.

Mr. Green: We think the jury should be sent for
187 and interrogated in such a way as the court sees fit that will call the least attention to the articles broadcast if they have not already been known to the jury. I think they have been, but that is probably up to your Honor to ask them.

The Court: I think we will have to tell the jurors that there has been some publicity in connection with a crime recently committed in this district, and ask them if any of

them have read those articles, and if they have read them whether they have been influenced by them.

Also, if they have heard this broadcast, and if they have heard that whether or not they have been influenced by it. We will have to go that far if we are going to interrogate them about anything.

Mr. Green: Very well, sir.

The Court: All right, bring the jury in.

188 (Whereupon, at 10:50 a.m. the jury was brought into the court room and the following took place in the presence and hearing of the jury:)

The Court: Good morning, ladies and gentlemen of the jury.

The Jurors (in unison): Good morning, your Honor.

The Court: Since our last adjournment there has been some publicity in the press and some activity over the radio concerning a crime which was committed out here in Lincolnwood in connection with the Lincolnwood State Bank.

I want to ask you members of the jury, first of all, whether or not you have read any of those articles?

A Juror: I did.

The Court: One lady said she read them. Are there others who read them?

A Juror: I did.

The Court: Then I want to ask you whether or not

189 you heard a radio broadcast in connection with that affair? Did anyone of you hear that?

The Jurors (in unison): No, sir.

The Court: Apparently none of the jurors heard that.

Now, in so far as the newspaper articles are concerned, there are about three jurors who have raised their hands and said they have read them.

I ask you individually whether the reading of them

has created in your mind any prejudice in so far as the defendant on trial is concerned?

The Jurors (in unison): No, sir.

The Court: Does that apply to all the jurors? Nothing that was read in any of these articles has had any influence upon your will have any influence upon you in so far as your verdict in this case is concerned, is that correct?

The Jurors (in unison): That is right.

The Court: Are there any questions suggested that we ask the jury?

190 Mr. Green: Whether the hearing of the radio or television broadcast influenced them?

The Court: I understand none of the jurors have heard any of the broadcasts.

That is correct, isn't it?

The Jurors (in unison): Yes, sir, your Honor.

The Court: I take it, therefore, they could not have heard the content of any radio broadcast if they didn't hear the broadcast.

Mr. Green: I mean, by hearsay report?

The Court: Did anybody tell you about any broadcast, radio broadcast?

The Jurors (in unison): No, sir.

The Court: Apparently not.

So the motion will be overruled.

There was a witness on the stand, wasn't there?

Mr. McGarr: Yes, sir.

The Court: Before we start this I want to tell the jury it is necessary for me to attend a funeral this

191 afternoon. So, we will just work until our noon recess today.

Proceed.

WILLIAM P. HUNTER, recalled as a witness in behalf of the Government, having been previously duly sworn, was examined and testified further as follows:

Cross Examination by Mr. Green.

Q. Mr. Hunter, you were on the stand when we adjourned last Friday?

By the Witness:

A. Yes, sir.

Q. First, Mr. Hunter, I would like to have you name the various Agents who were present on the 17th of January, 1956 at 1110 South Austin Boulevard. I don't recall that list being given on your direct examination. Will you do so?

A. Raymond Connolly.

Q. Raymond Connolly?

A. Yes, sir.

Joe Wheeler.

192 Leonard Wolf.

George Gillem.

Walter Peters.

Harold Sell.

Leo Pedrotty.

Denis Shanahan, and myself.

Q. There were nine Agents in all, is that correct?

A. Was that nine?

Q. Yes?

A. Yes.

Q. What time did you arrive at that vicinity?

A. At that vicinity?

Q. Yes?

A. As I recall, around two-thirty or three o'clock in the afternoon.

Q. Were all of the Agents present at the time of your arrival, the Agents you named?

A. In the house?

Q. No. No, in the vicinity?

A. No.

Q. Were you the first one at the scene, or among the first?

A. I was one of the first.

193 Q. There was no one at the scene before you?

A. They might have gotten there thirty seconds before me.

Q. That would be all?

A. Yes, sir.

Q. When you arrived at the scene, I take it you took positions about the apartment at 1110 South Austin, is that correct?

A. That is right.

Q. Where were you when you took a position outside of the apartment?

A. Outside of the apartment?

Q. Yes?

A. I was at the front door.

Q. At the front door?

A. Yes, sir.

Q. With you there was whom?

A. With me there was Ray Connolly, Leonard Wolf and Joe Wheeler. That is all I can recall.

Q. And the balance of the Agents were where? Were they at the backdoor?

A. As I recall, George Gillem, and I believe Walter Peters were at the back door.

Q. Then in other words, all of the Agents who
194 were there were located within a view of the building in which the apartment in which the defendant was found and was located, is that right?

A. I don't understand that?

Q. And you were watching that apartment, and all the Agents were there so located as to watch the apartment and the exits of the apartment?

A. We were in the neighborhood.

Q. What time was it that the defendant Nicholas Guido entered the apartment that day?

A. I didn't see him enter.

Q. What time did you enter the apartment?

A. Approximately a quarter after five.

Q. Who, if you know, did see him enter the apartment that day?

A. I don't recall anyone actually seeing him enter the apartment.

Q. Did you see him outside of the apartment that day?

A. No, sir, except when we left.

Q. After you left the apartment?

A. When we were leaving I saw him outside.

Q. Did any of the other eight Agents relate to you having seen him enter that apartment prior to the 195 time you entered?

A. No, sir.

Q. What then was the occasion for your entering the apartment?

A. We were in the neighborhood. I would say, in the area of five, six or seven blocks of the place and making passes in front of the house looking for this car that he was driving.

Q. And you were looking for the defendant as well, isn't that so?

A. That is right, sir.

Q. What was the purpose of your entering the apartment approximately three hours after you arrived in the vicinity?

A. We weren't sure whether he would be there or not.

His car wasn't parked out in front when we first arrived there.

Q. You had not seen him before that day; before you entered the apartment?

A. Myself, you mean?

Q. Yes?

A. I had never seen him before.

Q. Had any of the Agents with you, if you know, seen him that day outside of the apartment?

196 A. Not to my knowledge.

Q. Sir?

A. Not to my knowledge.

Q. That was not related to you by anybody?

A. No, sir.

Q. When were you assigned to this case, Mr. Hunter?

A. I would say—I don't recall specifically but I would say a day or so after the actual bank robbery.

Q. You knew, did you not, that the defendant resided in an apartment other than the apartment at 1110 South Austin Boulevard?

A. No, sir, I didn't.

Q. You never had that related to you by any other Agent, is that correct?

A. I was under the impression he had previously lived at various other places.

Q. At that time you did not know he had another address?

A. My understanding at that time was he lived at that address.

Q. 1110 South Austin?

A. Right, sir.

Q. You had no process for his arrest on your

197 person?

A. No, sir, I didn't.

Q. Which of the Agents had process for his arrest?

A. As well as I can recall, Agent Connolly.

Q. That was an arrest warrant issued by the Commissioner, is that so?

A. Yes, sir.

Q. Now, who first entered the apartment?

A. I think it was Connolly.

Q. Did you observe the defendant being placed under arrest?

A. I did, sir.

Q. After he was placed under arrest all of the nine Agents entered the apartment, is that so?

A. No. I think probably a couple of them. A couple or three of them got there a few minutes later.

Q. But at some time all of the nine Agents were in the apartment?

A. Yes.

Q. How long did the Agents remain in that apartment?

A. We left at 6:25.

198 Q. And you entered at 5:15, is that correct?

A. Yes, sir.

Q. During that period of an hour and ten minutes the nine Agents were engaged in a search of the apartment, is that right?

A. Well, of course, there were a couple of three with him.

Q. Well, the balance of the Agents, other than the couple or three that were with him, they were engaged in searching the apartment, isn't that so?

A. That is correct.

Q. Will you state to the court and jury what the apartment consisted of?

A. Yes, sir. There was an entranceway that came in onto the living room.

Q. The living room is to the left, as I understand it, of the entranceway, is that right?

A. Slightly to the left. You enter the living room itself and the majority of the living room is to your left.

To your right is a large dining room.

Q. To your right as you enter is a large dining room?

199 A. Yes, sir.

West of the dining room is the kitchen.

Q. That would be immediately behind the dining room we are speaking of now, the dining room was to the right of the living room and behind that would be the kitchen, is that so?

A. Yes, sir. If you enter here (indicating), you are entering the living room, and to your right is the dining room.

The next room is the kitchen.

Q. Further to the right?

A. Yes, sir. Then there is the kitchen. Then there is a back porch.

Now, as you enter there is a partition that goes down the length of the apartment, directly in front of you and slightly to the right would be the front bedroom.

Next to the bedroom is a closet, and then the bath.

Further down is the second bedroom.

On the other side of the second bedroom is a TV room, or a sun parlor.

That is the apartment. Two bedrooms, a living room, a dining room, a kitchen and a bath.

200 Q. And throughout the hour and ten minutes you were present in the apartment, as I understood your direct testimony, the defendant Guido remained in the front or living room?

A. He wasn't there all the time.

Q. Where was he when he wasn't there?

A. I saw him and the Agents pass through the various rooms. The majority of the time he was in the living room.

Q. Now, during the course of this hour and ten minutes that the group of Agents were there, you examined and inspected all of the material in that apartment?

A. Sir?

Q. When the group of Agents who were present there for that hour and ten minutes you examined and searched the entire apartment, is that right?

A. Yes, sir.

Q. Including all five?

A. Yes, to the best of my knowledge.

Q. I think you told us about a pair of shoes that were taken from a closet during your examination or search?

201 A. Yes, sir.

Q. Where was that closet located?

A. That closet was just to the right of the entrance-way.

Q. Off of the dining room?

A. Well, I would say in between the dining room and the living room.

Q. The closet door was closed, and you opened the closet door, I think you said?

A. No, I don't recall whether the door was closed or not.

Q. But were you the o ly one present when you entered the closet?

A. There was another Agent and myself.

Q. Who was the other Agent?

A. Leonard Wolf.

Q. How many pairs of shoes did you find in this closet?

A. Two pair.

Q. Two pair?

A. Altogether?

Q. Altogether?

A. Oh, I would say there was probably six or seven pair in there altogether, including women's shoes.

202 Q. How many pairs of men's shoes?

A. I would say probably about four pair; three or four pair.

Q. You only took two pair of shoes, is that correct?

A. Yes, sir.

Q. Those pair had Essex heels?

A. One pair did.

Q. One pair had Essex heels?

A. Yes, sir.

The Court: What kind of heels?

Mr. Green: Essex, E-s-s-e-x.

By Mr. Green:

Q. Essex, is that correct?

By the Witness:

A. Yes, sir.

Q. Was Mr. Spencer present in that apartment on that day? Ross Spencer?

A. Yes, sir.

Q. I don't believe you gave us his name before, isn't that right?

A. If I didn't, I am sorry.

Q. When did he arrive?

203 A. I don't recall the exact time when he arrived.

Q. There were ten Agents in all present?

A. Apparently ten, yes, sir.

Q. Mr. Spencer was in charge of the case at that time, wasn't he?

A. He was the supervisor.

Q. He was the one who directed this exploratory search, is that right?

A. Yes, sir.

Well, he was our supervisor. He wasn't there when we went in. Now, actually, what he did when he got there, I don't know.

Q. Who directed the search?

A. I was in charge of the search.

Q. Were you in charge of the case at that time? Was the case assigned to you at that time?

A. No, sir.

Q. Who was the case assigned to at that time?

A. As far as I know, I think it was Leonard A. Wolf.

Q. When did you know a process was obtained for the arrest of the defendant?

A. I think it was obtained that morning.

204 Q. After that process was obtained, did you see the defendant until you saw him in the apartment?

A. No, sir.

Q. Or did any member of the group of Agents relate to you having seen the defendant until you saw him in the apartment?

A. No.

Q. Would it have been possible from the position you occupied outside of the apartment for the defendant to have entered that apartment only about fifteen minutes prior to the time of your entry?

A. I don't think so.

Q. In other words, you had that apartment under surveillance for that period of time prior to your entry?

A. We were not in a position actually to see the front of that apartment. What we were doing, we were making passes at the apartment waiting to see his car, but I was

not in a position to where I could see the front of the apartment.

Q. I think you told us Friday about entering the Pioneer Bank vault at the Pioneer Bank, and taking
205 from that vault some $3100 in United States currency?

A. Yes, sir.

Q. And you spoke of five $50 bills upon which there were certain pencil notations, is that right?

A. Yes, sir.

Q. Now, there were pencil notations on approximately one-half of the bills, weren't there?

A. That is right.

Q. And by pencil notations you mean various figures?

A. That is right.

Q. That is the only thing you mean?

A. I think I explained it, that there were pencil notations on a number of the bills.

Q. And that number amounted to about fifty percent of them?

A. I don't know exactly how many but a large amount of them were marked.

Q. These notations were the sole thing on there? There was nothing else there?

A. I couldn't—

Q. You don't recall?

206 A. I don't recall.

Mr. Green: Excuse me, your Honor.

The Court: Yes.

Mr. Green: I think that is all.

The Court: Have you any redirect?

Mr. McGarr: Yes, sir.

Redirect Examination by Mr. McGarr.

Q. Will you explain what you mean, Mr. Hunter, by "making passes in front of the apartment"? I am afraid I don't understand that?

By the Witness:

A. We would drive by the apartment. We knew the type of car that Guido was driving. The first time we got out there we didn't see the car. So we assigned ourselves to different areas and would drive by the house.

Q. And what factor caused you on one of these passes to drive to the apartment?

A. One of the cars, approximately—oh, five, ten or thereabouts, radioed us that they had seen a car resembling—

Mr. Green: I am going to object to this, your 207 Honor.

The Court: Objection sustained.

By Mr. McGarr:

Q. Did you when you removed the shoes from the closet or any time after you did, exhibit them to the defendant Guido?

By the Witness:

A. I did.

Mr. Green: I will object to that as being already covered on direct. This is improper redirect.

The Court: Didn't you go into that on direct?

Mr. McGarr: I did, your Honor. I withdraw the question.

(Question withdrawn.)

By Mr. McGarr:

Q. Was the closet in which the shoes were found visible from where Mr. Guido was sitting in the living room, if you know?

By the Witness:

A. Well, the closet itself would have been visible. You couldn't have seen in the closet but he was in a position to go in and come out.

208 Mr. McGarr: No further questions.

The Court: Call your next witness.

Mr. McGarr: We will call Mr. Sell.

The Clerk: Will you raise your right hand and be sworn.

Mr. Harold Sell: Yes, sir.

(Witness duly sworn.)

HAROLD SELL, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. Will you state your name?

By the Witness:

A. Harold Sell.

Q. Your business or occupation?

A. Special Agent for the Federal Bureau of Investigation.

Q. To what office are you assigned?

A. Chicago, Illinois.

Q. How long have you been a Special Agent?

209 A. Approximately five years.

Q. Did you participate in the course of your duties as a Special Agent of the FBI in the investigation of the robbery of the Maywood-Proviso State Bank?

A. Yes, I did.

Q. Do you know the defendant, Nicholas Guido?

A. I do.

Q. Do you see him in the court room?

A. Yes, I do.

Q. Will you point him out, please?

A. Yes, sir. He is the last gentleman at the table there on the other side of the court room.

Mr. McGarr: For the record, he is indicating the defendant Guido.

By Mr. McGarr:

Q. Calling your attention to January 17, 1956, did you see Mr. Guido on that day?

By the Witness:

A. Yes, I did.

Q. Where, if you recall, was that?

A. I saw him in the apartment at 1110 south Austin.

Q. About what time of the day was that?

210 A. It was approximately five-thirty in the evening.

Q. Did you participate with the other Agents in the search of that apartment?

A. Yes, I did.

Q. Was Mr. Guido in custody at that time, if you know?

A. Yes, he was in custody at that time.

Mr. Green: I object to that as calling for a conclusion, your Honor, and ask that the answer be stricken.

Pardon me. I withdraw the objection. I misunderstood it.

By Mr. McGarr:

Q. What if anything did you find in the course of that search?

By the Witness:

A. In the search of the apartment, the dining room of the apartment, in a man's topcoat and suit coat I located various bills of United States currency in that particular item of clothing.

Mr. McGarr: I would like to have these marked as Government's Exhibit 15 for identification.

211 (Said United States currency was thereupon marked Government's Exhibit 15 for identification.)

By Mr. McGarr:

Q. I show you, Mr. Sell, an envelope that has been marked for identification as Government's Exhibit 15, containing approximately $90 in United States currency, and ask you if you will examine the contents, please?

By the Witness:

A. Yes, sir.

(Whereupon the witness looked at some currency.)

Q. In searching the coat in the dining room approximately what sum of money, if you recall, did you find?

A. It was $90.34 all told.

Q. Did you examine the serial numbers on the bills contained therein?

A. Yes, sir, I did.

Q. I show you, Mr. Sell, a $10 bill which I am taking from this envelope, marked for identification as Government's Exhibit 15, and ask you if you have seen that before, please?

212 A. I will have to refer to my notes on that.

Mr. Gorman: May we have a better identification of that bill?

Mr. McGarr: I am sorry, I should have mentioned that.

By Mr. McGarr:

Q. I am referring to this bill with serial number G-97753057C.

You said you were unable to answer that question without referring to your notes, Mr. Sell?

By the Witness:

A. That is right.

Q. What notes did you make on that currency which was taken at the time?

A. These (indicating) are the notes I took at the time I found these particular bills.

Q. Did you record the serial numbers of those bills at that time?

A. Yes, sir.

Q. Does that note you are referring to have a list of the serial numbers of the bills?

A. It has.

Q. I show you again this bill, the bill with the
213 serial number I have just read, and I will ask you if that was among the bills that you took from the coat in the apartment?

A. Yes, sir, it was.

Q. Calling your attention to January 19, 1957, did you see the defendant Guido on that occasion?

A. Yes, I did.

Q. Where was that, if you recall?

A. It was in the neighborhood of Pulaski and North Avenue.

Q. More precisely, is that the location of the Pioneer Bank?

A. Yes, sir, it is.

Q. With reference to the bank, where was it you saw the defendant?

A. I saw Mr. Guido in a restaurant located at two or three doors east of the intersection of Pulaski and North Avenue.

Q. Did you have any conversation with him on that occasion?

Mr. Green: Excuse me. What is the date of that, the 19th?

Mr. McGarr: Yes, sir.

By Mr. McGarr:

214 Q. (Continuing) Did you have a conversation with him on that occasion?

By the Witness:

A. Yes, sir, I did.

Q. Who else was present, if you recall?

A. There was another Agent with me, Agent Joe Wheeler, and there was Mr. Guido and a woman. I don't know who she was. I had never met her before. I don't know her identity.

Q. Was she, to your observation, with the defendant Guido?

A. They were sitting in a booth eating a meal at that time.

Q. At about what time was that?

A. That would be shortly before nine o'clock in the morning.

Q. What do you recall was the conversation? Indicate what you said and what Guido said, if anything.

A. To the best of my recollection we said, "Good morning."

And Mr. Guido said, "I suppose you are surprised to see me here?"

I said, "No more surprised than you are to see 215 me."

Mr. Guido asked, "What are you guys doing following me all the time?"

I didn't answer that question.

Mr. McGarr: No further questions.

Mr. Green: I am going to ask that that be stricken, that portion of the testimony where he said he saw him on the 19th day of that month, and where Guido asked him, "What are you guys doing following me?"

I don't see where that adds anything to this.

Mr. McGarr: I think the time and place is particularly significant, your Honor. The Agents were there for another purpose.

Mr. Green: This was in the vicinity of the Pioneer Bank, not in the vicinity of any place else. That is where the box was.

Mr. McGarr: This was on the date on which the box was opened, and it is the precise time that the de-
216 fendant was apparently there. I think his presence there at that time is significant. It was the time just before the bank was opened. That is the purpose of this.

The Court: What about the conversation to which you refer?

Mr. McGarr: Well, merely that he recognized the defendant and the defendant recognized him. It has no strong bearing.

The Court: The conversation may go out. The rest of it may stay.

Mr. McGarr: That is all.

The Court: Cross examine.

Cross Examination by Mr. Green.

Q. Where did you find this topcoat from which you took the $90.34, Mr. Sell?

By the Witness:

A. It was in the dining room, sir.

Q. Was it in the closet in the dining room or laying on a chair in the dining room?

A. It was laying on the back of a chair in the
217 dining room.

Q. What time did you arrive at the vicinity of 1110 South Austin Boulevard on the day of the arrest?

A. I was in that particular vicinity working on another case during the course of the day, sir, but in connection with this particular case it would be shortly, approximately 5:15, I believe.

Q. You were not there until 5:15?

A. As far as this particular investigation, yes, sir.

Q. You were there on some other case?

A. In the vicinity.

Q. With whom were you working on the other case?

A. With whom was I working?

Q. Yes?

A. Agents Wolf, Leonard Wolf and Joe Wheeler.

Q. Wolf and Wheeler?

A. That is right, sir.

Q. And until 5:15 you were working on some other case with Mr. Wolf?

A. On this particular day?

Q. On this particular day?

A. Yes.

218 Q. On the 17th of January?

A. Not the full day, but we were in that neighborhood on the day of the 17th of January.

Q. Wasn't Mr. Wolf in charge of the Guido case on that day?

A. That I wouldn't tell you, sir.

Q. Who was in charge of the Guido case on that day, if you know?

A. To the best of my recollection it would have been Mr. Hunter, sir.

Q. What caused you to go to 1110 South Austin on that day? Was it a radio call?

A. Yes, sir.

Q. Mr. Wolf was with you until you entered the apartment that afternoon?

A. Not until the time we went into the apartment, no, sir.

Q. Did Mr. Wolf have another car that day, or were you, Mr. Wheeler and Mr. Wolf all in one car?

A. To the best of my recollection, I believe I was with Mr. Wolf on that particular day in his car, and prior to going into the apartment itself there was a conference, at which time we went on different assignments.

219 Q. Who directed the search of the apartment after you had entered the apartment?

A. Mr. Hunter.

Q. Mr. Hunter?

A. I got my assignments from Mr. Hunter, yes, sir.

Mr. Green: That is all, Mr. Sell.

Mr. McGarr: No further questions.

The Court: That is all, Mr. Witness.

The Witness: Yes, sir.

(Witness excused.)

Mr. McGarr: Your Honor, at this time I would like to move to introduce into evidence the following Government's Exhibits, Government's Exhibits 5, 6, 7, 8 and 9, which are five $2 bills.

10, which is—I will omit that at this time. 10 or 11.

12and 12-A, which are a pair of shoes found in the apartment.

Government's Exhibit 13, which has been referred to as being an envelope containing $3150, and the only relevant portion are for $50 bills. These four $50 have already been identified. And the $5 and the $10 bills with the serial numbers that have been given. That will be the contents of Exhibit 13.

Government's Exhibit 15 is an envelope containing $90 and some cents, from which I will abstract a single bill, which I move to introduce, bill No. 9775307C.

The Court: What denomination?

Mr. McGarr: This is a $10 bill too, your Honor, which is a part of the numerical sequence.

These four $50 bills, I am having them marked and will introduce them as 14, 14-A, 14-B and 14-C. They have already been marked.

Mr. Green: Your Honor, may I suggest that this might be an appropriate time for a recess so we may look over these bills?

The Court: All right. We will take a recess for a few minutes.

(Recess taken.)

221 The Court: Proceed.

Mr. Green: Concerning the exhibits which have been offered by the Government at this time, your Honor, the defense interposes no objection to the introduction of Government's Exhibits—four of the $2 bills of Government's Exhibit 2. These are not broken down but there are three of them that the witness from the lingerie department testified she received from the defendant. Here they are (indicating).

We have no objection to Government's Exhibits 7, 8 and 9.

We have no objection to Government's Exhibit 6. That is from the service station.

We have no objection to Government's Exhibit 11. The record from Sears Roebuck showing the servicing of a Cadillac bearing a certain serial number.

We do object to the $2 bill which has been offered
222 as Government's Exhibit No. 5. That is the candy department bill. It has no identification.

Mr. McGarr: Where is 5?

Mr. Green: It is in this group here. I don't know which one it is (indicating).

We have an objection to that portion of Government's Exhibit 13, which consists of five $10 bills which were taken from the box, allegedly rented by the accused in the Pioneer Bank. Also the $1 bill.

The Court: $1 bill?

Mr. Green: The $10 bill, I mean, which is included in Government's Exhibit 15-A, which was in a pack of currency which was taken from a topcoat in his apartment. We object to those because there is no showing whatsoever in the record at this time that any of these $10 bills

ever had their origin in the Maywood-Proviso State Bank, no showing whatsoever.

The same holds for the four $50 bills which are
223 offered as a part of Government's Exhibits 14, 14-A, 14-B and 14-C.

Isn't that right?

Mr. McGarr: The $50 bills, I may have misread that.

Mr. Green: The four $50 bills?

Mr. McGarr: The four $50 bills were merely along the total in the group of 14-A, 14-B and 14-C. These were merely four $50 bills taken from Government's Exhibit 13, from that sum of money.

Mr. Green: Very well.

We object to those because there is no showing of any connection of those bills at the present time ever coming from the bank.

I think there has been evidence that they bore certain pencil notations, which was brought out on cross examination certain numbers, but beyond that we don't have any connection. So, we will object to those at this time.

As far as the one $10 bill, which was taken from
224 the coat of the accused in the apartment on Austin Avenue, and as far as the shoes are concerned which were offered as Government's Exhibits 12 and 12-A, there is more substantial form of objection upon which Mr. Gorman would like to be heard.

Mr. Gorman: Would your Honor want us to argue now before you pass on the others?

The Court: Well, as far as the $50 bills are concerned, what answer do you have to his objection?

Mr. McGarr: Perhaps I was premature in offering those with the others.

The Court: At the present the objection will be sustained.

Mr. McGarr: As far as the $10 bills are concerned,

there will be no evidence linking those specifically with the bank, but we think they have an admissible and probative value which rest upon the presence in the possession of the defendant after the bank robbery; five or
225 six bills with consecutive serial numbers, which circumstance is extraordinary, along with the other evidence in the case.

The Court: That is pretty far-fetched. I will sustain the objection to that.

And in so far as the $2 bill for the candy is concerned, I will overrule that objection.

Mr. Green: The candy $2 bill?

The Court: Yes.

We sustained two of your objections and overruled one.

Mr. Green: All of the $2 bills are received in evidence, your Honor?

The Court: Yes.

Mr. McGarr: The four $50 bills are excluded?

The Court: Yes, and the $10 bill.

Mr. Green (addressing Mr. McGarr): You are just withdrawing the $50 bills?

Mr. McGarr: Yes, sir.

The Court: Do you want to talk about the shoes?

226 Mr. Gorman: About the shoes, yes, sir.

The Court: I understand the only evidence of the shoes so far is that they were taken out of a closet over at this apartment, is that correct?

Mr. Gorman: That is correct.

The Court: Is there any further evidence concerning the shoes?

Mr. McGarr: Yes, your Honor. The shoes will be matched with the heel print that was found.

The Court: You haven't put that in yet?

Mr. McGarr: No, sir. I am prepared to do it now.

The Court: Then let us bring the jury in.

Mr. Gorman: If your Honor please, for the sake of expediting the matter, and before we call their attention to it, we would just as soon argue it now.

Mr. Green: I would like to ask Mr. McGarr a question or two.

(Addressing Mr. McGarr): Do you intend to have
227 further Agents who participated in this search of this apartment to testify?

Mr. McGarr: Yes, sir.

Mr. Green: You do?

Mr. McGarr: Yes, sir.

Mr. Green: Then I suggest that we defer it.

The Court: All right.

We had a witness on the stand here a minute ago, didn't we?

Mr. Green: He was excused, your Honor.

The Court: Oh, that is right.

Bring the jury in.

(Whereupon the following took place in the presence and hearing of the jury:)

Mr. McGarr: We will call Mr. Connolly.

The Clerk: Will you raise your right hand and be sworn.

Mr. Connolly: Yes, sir.

228 RAYMOND A. CONNOLLY, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. Will you state your name, sir?

By the Witness:

A. Raymond A. Connolly.

The Reporter: Is your last named spelled C-o-n-l-e-y?

The Witness: It is spelled C-o-n-n-o-l-l-y.

By Mr. McGarr:

Q. Your business or occupation?

By the Witness:

A. Special Agent for the Federal Bureau of Investigation.

Q. Do you know the defendant, Nicholas Guido?

A. Yes, I do.

Q. Do you see him in the court room?

A. Yes, I do.

Q. Will you point him out?

229 A. He is at the second table, the last man over there (indicating).

Mr. McGarr: For the record, the witness has identified the defendant, Nicholas Guido.

By Mr. McGarr:

Q. Calling your attention, Mr. Connolly, to January 17, 1956 did you see him on that day?

By the Witness:

A. Yes I did.

Q. Where was that, if you recall?

A. That was in an apartment building located at 1110 South Austin Boulevard.

Q. Approximately what time was that?

A. About 5:15.

Q. Was there any conversation between you, Mr. Connolly, and Mr. Guido at that time?

A. At that time I advised him we had a warrant for his arrest.

Q. What if anything did he say?

A. He inquired as to what the nature of the warrant was.

Q. Did you tell him?

A. Yes, I told him it was in conjunction with a 230 robbery at the Maywood-Proviso Bank.

Q. Did you place him under arrest at that time?

A. Yes, I did.

Q. As you entered this apartment, did you observe an automobile parked in the vicinity?

A. Yes, I did.

Q. Will you describe it, please?

A. It was a 1955 black Cadillac, bearing 1955 Illinois license 1 571 499.

Q. Where in relation to 1110 South Austin was this car?

A. The car was parked immediately in front of 1110 South Austin.

Q. While you were present in the apartment, was there a search made incident to this arrest?

A. Yes, there was.

Q. Was the defendant Guido present during the search?

A. Yes.

Q. Was there anyone else other than the FBI Agents present?

A. Guido's wife and two or three children were present.

231 Q. Was there any conversation between you and the defendant Guido relative to this search?

A. When the search was completed, the items that were obtained in this search were taken into the living room where Mr. Guido was. They were shown to him and he was asked if these items were his.

He stated—

Mr. Green: I object, unless it is specified by whom?

The Court: He said by Guido.

Mr. Green: No, he didn't, your Honor. He said he was asked, or something to that effect.

The Court: Oh.

The Witness: I believe it was Special Agent Hunter.

Mr. Green: A little louder?

The Court: He said he believed it was Special Agent Hunter.

By Mr. McGarr:

Q. What if anything did Guido say?

By the Witness:

A. Mr. Guido said, "I am not admitting to any-
232 thing."

Q. Was there any further conversation relative to these items?

A. The question was asked, or he was informed at that time we were going to take these items with us.

The Court: Speak a little louder, Mr. Witness, please.

The Witness: Yes, sir.

By Mr. McGarr:

Q. Do you recall any further conversation in reply to that?

By the Witness:

A. Yes, he replied. Mr. Guido said he did not care.

Mr. McGarr: No further questions.

The Court: Cross examine.

233 *Cross Examination by Mr. Green.*

Q. When did you arrive at that address on that date, at 1110 South Austin?

A. Approximately at ten o'clock in the morning.

Q. Ten o'clock in the morning?

A. Yes, sir.

Q. How long did you remain there that day, Mr. Connolly?

A. Until the arrest was made at 5:15.

Q. Who were you with?

A. I was with Special Agent Hunter.

Q. When did you observe that black Cadillac that you told us about in front of that apartment 1110 South Austin?

A. Oh, a few moments prior to our entrance into the apartment.

Q. You hadn't seen that black Cadillac before that day?

A. No sir.

Q. But you had observed the front of the apartment on numerous occasions before that day, is that correct?

A. Yes, sir.

234 Q. When the black Cadillac was not there?

A. That is right.

Q. Did you see the black Cadillac drive up?

A. No, sir.

Q. Did you see Mr. Guido before that day until you placed him under arrest in that apartment?

A. No, sir.

Q. Where were you when the black Cadillac came to the apartment?

A. I was parked on Roosevelt Road west of Austin.

Q. With Mr. Hunter.

A. That is right.

Q. Who first saw that black Cadillac if you know?

A. Special Agent Walter Peters.

Q. How are you able to state Mr. Peters first saw it?

A. He radioed us that a black Cadillac, a 1955, bearing license plates 1 571 499 was observed pulling off of Roosevelt Road and proceeding down Austin Boulevard.

Q. In other words, according to the information given you by Agent Peters the black Cadillac in question was seen being driven outside of that apartment that day, is that right?

235 A. That is correct.

Q. Did Mr. Peters, or the group of Agents with

Mr. Peters, follow that Cadillac, if you know?

A. No, they did not.

Q. How do you know that?

A. Special Agent Peters made the turn into Austin Boulevard in front of Mr. Guido, and there were several cars in between him and Mr. Guido. He advised us by radio that the car, a black Cadillac, was turning into Austin Boulevard after him.

Q. You knew then Mr. Guido was seen then by Agents of the Federal Bureau of Investigation that day outside of the apartment then?

A. No, the car was seen.

Q. Didn't you just tell us that Mr. Guido made some kind of a turn?

A. I said a black Cadillac.

Q. You were not speaking of Mr. Guido?

A. No, sir.

Q. But you knew, did you not, that the black Cadillac bearing the license number in question was a Cadillac of Mr. Guido's, didn't you?

A. Yes, sir.

236 Q. Who was in charge of the group as they were at 1110 South Austin Avenue address on that day?

A. I was in charge of the arrest.

Q. You were in charge of the arrest?

A. Yes, sir.

Q. Who was in charge of the case at that time?

A. Special Agent Hunter.

Q. How many Agents were engaged in the search of the apartment at 1110 South Austin after entry was obtained?

A. I couldn't say.

Q. Were there ten or more?

A. I don't believe so. I am not certain as to the number involved in the search.

Q. Well, Mr. Spencer was there, wasn't he? Ross Spencer?

A. No, he was not in the apartment.

Q. He was never in the apartment on that day?

A. No, sir.

Q. Joe Wheeler?

A. Joe Wheeler was in the apartment.

Q. Leonard Wolfe?

A. Yes, sir.

Q. Leo Pedrotty?

237 A. Yes, sir.

Q. Walter Peters?

A. Yes, sir.

Q. And you are Connolly?

A. Yes, sir.

Q. George Gillem?

A. Yes, sir.

Q. Harold Sell?

A. Yes, sir.

Q. And Denis Shanahan?

A. Yes, sir.

Q. Yourself?

A. Yes, sir.

Q. Was there anybody else that you recall?

A. No, I can't recall anyone else.

Q. And all these Agents that you have just named were making a search of the apartment, is that right, sir?

A. I don't know if they all participated in the search.

Q. Well, you were there for over an hour, weren't you?

A. As I recall, we left at approximately 6:25.

Q. And after you had placed the defendant under
238 arrest he said to you he was not admitting anything, is that the language as you recall it?

A. Yes.

Q. Therefore, for that period of time that you were present in the apartment there was a search going on, is that right?

A. There was a search, yes.

Mr. Green: That is all. Thank you.

The Court: Any redirect?

Mr. McGarr: Yes, sir.

The Court: Proceed.

Redirect Examination by Mr. McGarr.

Q. What did you do, Mr. Connolly, after you received the radio message from Mr. Peters?

By the Witness:

A. We proceeded from our position on Roosevelt Road. The traffic was quite extensive at that time. By the time we arrived in front of the address of 1110 South Austin Boulevard we observed the black Cadillac parked in front of this address.

Q. Did you go in there right after you arrived?

239 A. Yes, a few minutes after we arrived we went into the apartment.

Q. Who was the first one in the apartment, if you know?

A. I was.

Mr. McGarr: No further questions.

Recross Examination by Mr. Green.

Q. Mr. Connolly, Austin and Roosevelt is right around the corner from the apartment, isn't that right?

By the Witness:

A. Yes.

Q. And where you were stationed at Austin and Roosevelt you had a view of the area in front of the apartment, didn't you?

A. No, sir.

Q. What prevented you from having that view?

A. We were parked approximately a half a block west of Halsted.

Mr. Green: That is all.

Mr. McGarr: That is all.

The Court: The witness is excused.

(Witness excused.)

240 Mr. McGarr: We will call Mr. Gillem.

The Clerk: Will the witness be sworn.

(Witness duly sworn.)

GEORGE F. GILLEM, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. Will you state your name, sir?

By the Witness:

A. George F. Gillem, G-i-l-l-e-m.

Q. Your business or occupation?

A. I am a Special Agent of the FBI.

Q. How long have you been an Agent of the FBI?

A. Since May 12, 1941.

Q. Are you assigned to the Chicago office?

A. Yes, sir.

Q. Do you know the defendant, Nicholas Guido?

A. Yes, I do.

Q. Do you see him in the court room?

A. Yes.

241 Q. Will you point him out?

A. He is the gentleman sitting next to Mr. Gorman at that able (indicating).

Mr. McGarr: For the record, the witness is indicating the defendant Guido.

By Mr. McGarr:

Q. Calling your attention, Mr. Gillem, to January 17, 1956, did you see him on that occasion?

By the Witness:

A. Yes, sir.

Q. Where was that?

A. That was at the apartment on 1110 South Austin, I believe that was the address.

Q. Did you see him anywhere else subsequent to that time?

A. Yes, I did. I saw him at the office of the FBI, 212 West Monroe.

Mr. McGarr: I would like to have this marked as Government's Exhibit 16 for identification.

(Said fingerprint card was thereupon marked Gov-
242 ment's Exhibit 16 for identification.)

By Mr. McGarr:

Q. I show you what has been marked as Government's Exhibit 16, and I will ask you if you have ever seen that before?

By the Witness:

A. I have.

Q. Did you take the fingerprint impressions on that card?

A. Yes, I did.

Q. Whose prints were taken on that card?

A. They are the prints of Nicholas Guido.

Q. The man you just identified in the court room?

A. Yes, sir.

Q. How can you tell that you made the impressions on this card?

A. I signed my name on the card there, sir, and the date.

Q. Did you have any conversation with the defendant while that card of prints was being taken?

A. Yes, I did, sir.

Q. Does that card bear any information other than fingerprints?

243 A. Yes, it does. I asked him—

Mr. Green: I object to this, your Honor.

(Addressing Mr. McGarr): May I see that?

Mr. McGarr: Yes, sir. Here it is.

(Whereupon Mr. McGarr handed Government's Exhibit 16 to Mr. Green.)

Mr. Green: There is no objection, your Honor, to the question.

By Mr. McGarr:

Q. Did you fill out the information contained in the various blanks on this card?

By the Witness:

A. Yes, sir.

Q. From whom did you obtain the information?

A. From Nicholas Guido.

Q. Calling your attention to the name, "Nicholas Guido" written on that card, do you recall that entry? Did you make that entry?

A. I didn't write it on there, sir. He signed the card himself, but I asked him his name so that the other

244 spaces could be filled in. He said it was Nicholas Guido.

Q. Did you ask him his address at that time?

A. Yes, I did, sir.

Q. What address did he give you?

A. 1110 South Austin, Oak Park, Illinois.

Q. Did you ask him the date of his birth?

A. Yes, I did.

Q. What date did he give you?

A. He said he was born on 6-11-21.

Q. After you made the impressions on that card and the entries on the card, what did you then do with it?

A. I turned it over to the individuals who were interviewing Mr. Guido at the time.

Q. Calling your attention to February 7, 1956, Mr. Gillem, did you visit the Maywood-Proviso State Bank on that day?

A. Yes, sir.

Q. Was the bank open at that time?

A. Yes, sir.

Q. What did you do while you were there?

A. I took some money—some greenbacks out to that bank and presented them to the employees of that bank and had them examine them.

245 Q. I show you an envelope containing some United States currency marked for identification Government's Exhibit 13, and ask you if you have ever seen that before?

A. Yes, sir. This is the money I bought out to the bank to have them examine.

Mr. McGarr: No further questions, your Honor.

The Court: Cross examine.

Mr. Green: Shall I go ahead now, sir?

The Court: Yes, sir.

Mr. Green: I just have one or two questions.

Cross Examination by Mr. Green.

Q. When did you arrive at 1110 South Austin Boulevard on January 17th? What time of the day was it?

By the Witness:

A. It was approximately 5:10 or :15, or thereabouts.

Q. Where were you prior to that time on that day?

246 A. Prior to that time I had been out on the street in an automobile.

Q. On that matter? This matter?

A. Yes, sir.

Q. You were in the vicinity of 1110 South Austin Boulevard?

A. Yes, sir.

Q. Who were you with?

A. Special Agent Walter Peters.

Q. I think you said when you were at 1110 South Austin Boulevard you saw a black Cadillac which had been identified by you as the Cadillac of the defendant parked in front of that address, isn't that right?

A. Yes, sir. I saw the car in front of the apartment.

Q. You saw it before that day too, didn't you?

A. Yes, I had seen the car before.

Q. That day?

A. Yes, that day I saw the car prior to us entering, yes, sir.

Q. What time previous did you see that car?

A. Approximately three or four minutes before that.

247 Q. At any other time?

A. I had seen the car on another occasion.

Q. On that day?

A. Pardon me, sir?

Q. On that day?

A. On that day I had seen him not prior to that time, no.

Q. Just a few minutes before entering the apartment you saw the car on the street, is that right?

A. Yes, sir.

Q. Did you observe Guido at that time, sir?

A. I didn't observe him. I observed an individual in the car. I didn't know who it was.

Q. Did you follow, or attempt to follow the car at that time? You personally, sir?

A. I saw the car parked—stopped for a red light. It was going, I believe, west on Roosevelt. I made a left turn into Austin going north. The car pulled in behind our car. Mr. Guido pulled in behind our car.

Q. You didn't stop Guido's car, or that black Cadillac at that time, did you?

A. No, sir.

Q. You knew there was a process for Guido's ar-
248 rest at that time, did you not?

A. Yes, sir.

Q. Would it have been possible for you to have stopped the car at that time?

A. At the time—

Q. Yes or no? Could you have stopped the car?

A. No.

Q. Why not?

A. On account of the traffic. It was pretty heavy traffic. It was around five-fifteen.

Q. You were ahead of Guido's car, weren't you?

A. What is that?

Q. You were ahead of Guido's car, weren't you, when you first observed it?

A. Yes, sir.

Q. You were proceeding in the same direction?

A. No, sir. I was travelling east on Roosevelt.

Q. Which way was Guido's car travelling?

A. He was travelling west on Roosevelt.

Q. But you then turned right and Guido turned left?

A. I turned left and went north on Austin.

Q. That was in the same direction Guido turned.
249 wasn't it?

A. Yes, sir. He turned in after my car.

Q. After you turned?

A. Yes, sir.

Mr. Green: That is all.

The Court: Is that all?

Mr. McGarr: No, sir, I have another question or two.

Redirect Examination by Mr. McGarr.

Q. What time of the day was this, Mr. Gillem?

A. It was sometime between 5:10 and 5:15 p.m.

Q. Was it light or dark?

A. It was getting considerably dark.

Q. Were you able to see clearly a man who was driving a car when you saw it?

A. No, sir, I could not.

Q. As you proceeded on Austin Boulevard, was this black Cadillac directly behind you, or were there other cars between you?

A. I don't recall that right now, sir, but I think it turned in behind my car.

Q. After you first saw this car, what did you do?

250 A. We went down—

Q. While you were proceeding down the same street there what did you do?

A. We observed the car and then drove down the street and turned around and came back.

Q. What did the car do that you observed, if you know?

A. The car, I didn't observe it any further than that, other than the fact that it was not behind us any longer when we reached the end of the block, when I turned the car around.

Q. When you turned around and came back, did you see the Cadillac?

A. The car then was parked in front of that address.

Q. Did you see the individual who was driving it at that time?

A. I didn't see him in the car then, no.

Mr. McGarr: No further questions.

251 *Recross Examination by Mr. Green.*

Q. Where you turned into Austin was only a block from the apartment that you told us about, isn't that right?

By the Witness:

A. We turned approximately a half a block away. I think it was maybe, three or four doors from the corner of Roosevelt and Austin where his apartment is.

Q. As a matter of fact, you then had the car that turned on Austin, the black Cadillac, to such a time as it parked?

A. I didn't, sir. I was driving the car. I didn't see it any more after it turned. I drove up to the corner and turned around and came back after the car and it was gone. It didn't follow us down the street.

Q. You knew the apartment which was under observation was at 1110 South Austin Boulevard, is that right?

A. I knew that that had been his place where he lived, yes, sir.

Q. Who was with you, Agent Peters, you say?

252 A. Walter Peters.

Q. And as you drove by 1110 you mean to say that neither you or Mr. Peters observed the black Cadillac was following you?

A. The reason I didn't observe it, sir, I was driving the car and there was a lot of traffic. I just went down to the corner and turned around.

Q. Didn't you have any conversation with Mr. Peters concerning the movement of this car?

A. None other than the fact that I can recall he mentioned that the car turned in the same direction as we did.

Q. On which side of the street did the black Cadillac park?

A. As I recall, it was parked on the west side of Austin, facing south, as I recall.

Q. Then it would have been necessary for the black Cadillac to have made a U turn, isn't that so?

A. I assumed it did. I thought it turned around in the alley and came back, but I didn't see it.

Q. This was the black Cadillac you were looking for as having the description of Guido's car, is that
253 correct?

A. That is right, sir.

Mr. Green: That is all.

Mr. McGarr: No further questions.

The Court: That is all. Call another witness.

(Witness excused.)

Mr. McGarr: We will call Mr. Caton.

The Clerk: Will the witness be sworn.

Mr. Caton: Yes, sir.

(Witness duly sworn.)

HERBEY CATON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. State your name, please.

By the Witness:

A. Herbey Caton.

The Court: Speak up, please?

254 The Witness: Herbey Caton, H-e-r-b-e-y C-a-t-o-n.

By Mr. McGarr:

Q. State your business or occupation, Mr. Caton?

By the Witness:

A. I am a fingerprint examiner for the Federal Bureau of Investigation in Washington, D. C.

Q. How long have you been so employed?

A. I have been employed in fingerprint work for something over twenty-one years.

Q. What training have you received in the science of fingerprint examination?

A. When I started in the FBI I received instructions from FBI instructors, and since that time, that is, after the initial instruction period—

Mr. Green: We are willing to stipulate to the qualifications of this witness, your Honor.

The Court: All right.

Mr. McGarr: Thank you, Mr. Green.

By Mr. McGarr:

Q. What, Mr. Caton, is a latent fingerprint?

By the Witness:

A. A latent fingerprint is a fingerprint left on an object by perspiration or grease which might be present 255 on the ridges of the fingers.

Q. What, Mr. Caton, is an inked fingerprint?

A. An inked fingerprint is a fingerprint made by spreading a thin film of ink over the ridges and placing the fingers on a suitable background such as a fingerprint card.

Q. I show you, Mr. Caton, five $2 bills, which are Government's Exhibits 5, 6, 7, 8 and 9, and ask you if you have ever seen those before?

A. These happen to be $2 bills which I examined in the office of the FBI in Washington, D. C.

Q. I show you a document, or a card marked for identification as Government's Exhibit 16, and ask you if you have ever seen that before?

A. This is a fingerprint card bearing the name "Nicholas Guido" which I brought with me from the files of the FBI in Washington, D. C.

Q. Referring again to the $2 bills, Mr. Caton, in examining those did you find on any of those bills any latent fingerprints?

A. Yes. I developed two latent fingerprints and a latent palm print on three of the bills.

Q. Were the bills in this disclored condition, referring to the three darkened bills, when you first received
256 them?

A. No, sir, they were not.

Q. Will you explain what was done to them to discolor them that way?

A. The bills were treated with a solution of silver nitrate, which causes the bills to darken when exposed to light, and each time they are exposed to light they continue to darken more.

Q. Have you compared the latent fingerprints on the $2 bills which you have in your hand with the inked fingerprints on Government's Exhibit 16, the fingerprint card?

A. Yes, sir, I have.

Q. What is the result of your comparison in reaching your conclusion?

A. In my opinion the two latent fingerprints on the $2 bills were made by the right index and middle finger impressions on the fingerprint card.

Q. Is it your conclusion then the impression on the $2 bills were made by the same person who made the fingerprints on the fingerprint card?

A. That is right.

257 Q. Have you prepared a chart, or an enlargement of those prints to illustrate the method in arriving at this conclusion?

A. Yes, I have.

Q. Do you have that with you?

A. Yes, sir.

Mr. McGarr: I would like to have this marked as 17, 17-A for identification.

(Said photographs were thereupon respectively marked Government's Exhibits 17 and 17-A for identification.)

By Mr. McGarr:

Q. Mr. Caton, I show you two enlargements that I have just had identified as Government's Exhibits 17 and 17-A. Exhibit 17-A is one of them which you just handed me. Will you indicate what that photograph represents?

By the Witness:

A. 17-A consists of two photographs, one of which is an enlargement of the portion of the right index finger impression appearing on the fingerprint card, an en-
258 larged photograph of one of the latent prints on the $2 bill.

Q. Would it be possible to hold that so the jury could see it, and explain from that the basis upon which you arrived at the comparison and conclusion which you have just stated?

Mr. Green: Did you offer that in evidence, Mr. McGarr? There won't be any objection to it.

Mr. McGarr: I would like to offer this into evidence.

Mr. Green: No objection.

The Court: All right.

Mr. McGarr: These are Government's Exhibit 17 and 17-A, your Honor.

The Court: Yes.

(Said photographs, so offered and received in evidence, were respectively marked Government's Exhibits 17 and 17-A.)

By Mr. McGarr:

Q. Referring to Government's Exhibit 17, will you describe that please? Tell us what that is?

By the Witness:

A. Government's Exhibit 17 consists of a photo-
259 graphic enlargement of the right middle fingerprint which appear on the fingerprint card. And a photographic enlargement of one of the latent prints on the $2 bill.

Q. When you describe the latent prints, the enlarged latent prints of the $2 bill, Government's Exhibit 17, is that a different $2 bill than the one which we find in 17-A?

A. Yes, it is.

Q. In other words, you have one on each of these exhibits?

Mr. Green: If the Court please, I think he should identify the $2 bill from which the latent print was taken?

Mr. McGarr: Yes, sir.

By Mr. McGarr:

Q. Are you able to identify the $2 bill from which the latent fingerprint was taken by the serial number?

By the Witness:

A. The latent fingerprint which appears on Government's Exhibit 17 was developed on the $2 bill which bears serial number E22764060A.

Q. And the latent print taken from the $2 bill
260 portrayed in Government's Exhibit 17-A, do you know the serial number of that bill?

A. The latent print in Exhibit 17-A appears on the $2 bill bearing the serial number E22764071A.

Q. Once again, referring to my earlier question, will you explain to the jury, please. Mr. Caton, if you would, and hold that exhibit up so that it can be seen, the basis of your comparison upon which your conclusion is based as to the identity of the two prints?

A. Yes, sir.

May I step down, your Honor?

The Court: Yes, sir.

By the Witness:

A. (Continuing) Ladies and gentlemen, this chart was made to show you how we go about making fingerprint identifications. This (indicating) particular type of fingerprint is called a swirl.

Mr. Green: Your Honor, I am going to object to this general lecture which the witness is launching on. I think we can save a lot of time on this.

261 Mr. McGarr: He is referring to the exhibit.

Mr. Green: I am willing to stipulate that the prints on the original $2 bills which this witness has stated he found are the same as the fingerprints on the $2 bills named. There is no quarrel about that. I am willing to stipulate.

Mr. McGarr: Then I feel, your Honor, perhaps we can dispense with this explanation.

The Court: Yes. Upon that agreement I think you can dispense with it.

Mr. McGarr: Do you wish to cross examine?

Mr. Green: No.

Mr. McGarr: That will be all, Mr. Caton.

The Witness: Thank you.

(Witness excused.)

The Court: These charts he has, are they going into evidence? They haven't been identified.

Mr. McGarr: We have referred to them as 17 and
262 17-A, your Honor. They have been marked.

The Court: Oh, I see.

Mr. Green: No objection.

Mr. McGarr: Then I would like to move their admission in evidence at this time.

The Court: They may be admitted.

(Said charts, so offered and received in evidence, were respectively marked Government's Exhibits 17 and 17-A.)

The Court: Are there any questions you want to put to this witness?

Mr. Green: None at all, your Honor.

The Court: All right.

Mr. McGarr: The next witness may take some length of time, your Honor. I understand you want to adjourn at twelve-thirty?

The Court: Yes, we will adjourn at twelve-thirty until tomorrow morning.

Mr. McGarr: It is 12:25 now, your Honor.

The Court: Yes. We will now adjourn this case
263 until tomorrow morning at ten o'clock.

(Whereupon the further hearing of the above-entitled matter was continued until 10:00 o'clock Tuesday, April 30, 1957.)

264

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 56 CR 62) • •

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled case taken before the Hon. Michael L. Igoe, one of the Judges of said court, with a jury, in his court room in the United States Court House at Chicago, Illinois, Tuesday, April 30, 1957, 10 o'clock a.m.

Appearances:

Mr. Robert Tieken,
U. S. District Attorney, by
Mr. Frank McGarr, and
Mr. Harold Sodergren,
Assistant U. S. District Attorneys,
representing the plaintiff;
Mr. Richard E. Gorman, and
Mr. Joseph A. Green,
representing the defendant.

265 The Clerk: 56-CR-62. U. S. *v.* Guido. Case on trial.

The Marshal: Your Honor, they would like to talk to you before the jury comes in.

The Court: Yes, sir.

These gentlemen say they have some motions to make?

Mr. McGarr: First, your Honor, I wish to apologize. I had a case called for trial and I should have been there. That is the reason for the delay.

The Court: That is all right. We were not put out.

What is the motion?

Mr. Gorman: At this time, if your Honor please, the defendant through his attorneys move for the return of the unidentifiable funds which were received in the safety deposit box at the Pioneer National Bank on January 19, 1956.

Mr. McGarr: I have no objection, your Honor. The Government has held it only as evidence and it has no desire to keep it, subject to one limitation, however. That is, I do have several witnesses coming in today for the sole purpose of proving a man named Don Schiavone 266 who rented that box with the money is Nicholas Guido.

We are ready to agree to that effect, or should I go ahead? In other words, this claim for that money presupposes that it is Guido's money and he is Don Schiavone and he rented that box.

The Court: He swore to that in his affidavit, didn't he, that it was his money?

Mr. Gorman: That is correct.

Mr. McGarr: Well, could we stipulate to that for the benefit of the jury or shall I put on the witnesses?

The Court: He swore to that. In his motion to quash the search warrant he swore to that.

Mr. Green: We will stipulate to that.

Mr. McGarr: It is soley for the purpose of getting that information to the jury, because I think it is vital to the Government's case.

The Court: Yes.

Mr. McGarr: I had intended to use a handwriting expert to prove that.

Mr. Green: That won't be necessary.

Mr. McGarr: Could we agree on a simple stipulation that he is the Don Schiavone who rented that box?

Mr. Green: Yes. Do you have the box number?

267 Mr. McGarr: Yes, sir.

Mr. Green: We could make the stipulation right now, then.

Mr. McGarr: Then we could read it to the jury.

Mr. Green: Yes.

Mr. McGarr: Then that will end the Government's case some time today because I had at least five witnesses who were going to prove that point.

The Court: What point?

Mr. McGarr: That Nicholas Guido had the same handwriting as the Don Schiavone's signature on that box.

The Court: It is put in his petition for a motion to quash the search warrant that he swore he is that man and this was his money.

Mr. Green: That is right.

The Court: And that is his box.

Mr. McGarr: So, if we could adjourn for a few moments, we will give back the money, draw up a stipulation, and let me re-organize my witnesses, and then I am sure that the Government could rest, your Honor.

Mr. Green: Mr. McGarr has brought up another question. He says it was his intention to use five or six witnesses, but it won't be necessary now. He said he will

268 rest early today. Then we have a motion that will probably consume some time, and in the event that motion is determined unfavorable for the defendant, we probably will not go ahead with our witnesses until tomorrow. At least, we won't be prepared to.

Mr. McGarr: Let me see what I have left. We have Walter Peters.

The Court: That will work out.

Mr. McGarr: I think I will take the better part of the rest of the morning, your Honor, with the witnesses I have left and we will rest some time shortly before noon. We have a motion on the shoes, I assume.

Mr. Green: There was this lady who was under subpoena last night. We could have her here by 12 o'clock.

The Court: You could have your witnesses here tomorrow morning?

Mr. Green: No, your Honor, this was a witness subpoenaed by the Government, I mean.

The Court: Oh.

Mr. Green: I think we had an understanding she would be here at 2 o'clock.

269 Mr. McGarr: Perhaps we could get through shortly after 2 o'clock. Maybe a little before 12:30. If not, we will finish shortly after lunch.

The Court: All right.

Do you want to recess for a few minutes, now?

Mr. McGarr: If we may, so we could agree upon a stipulation, and I could turn the money over, and count it, and so forth.

The Court: We will take a recess.

(Recess taken)

The Court: Proceed.

Mr. McGarr: In order to simplify the record, your Honor, let the record show that the Government has just delivered $2900 to the attorneys for the defendant which was money taken from the safety deposit box at the Pioneer Bank, and we still retain for evidentiary purposes $250 that will be delivered at the conclusion of the trial.

The Court: What about the other matter?

Mr. McGarr: We have agreed upon a stipulation, your Honor. It is very brief. Would you like to see it?

The Court: No.

270 Mr. McGarr: Then I will just read it to the jury and we will then be ready to proceed.

The Court: Does that cover the question of the name too that you were talking about?

Mr. Green: It does.

Mr. McGarr: Yes, sir, it does.

The Court: All right.

Bring the jury in, please.

The Marshal: Yes, sir.

(Whereupon the following took place in the presence and hearing of the jury.)

The Court: Proceed.

Mr. McGarr: Good morning, ladies and gentlemen of the jury.

Counsel for the defendant and counsel for the Government have agreed upon a stipulation as to certain facts. I would like to read it to you:

"It is hereby stipulated and agreed by and between the United States of America through the United States Attorney and Nicholas Guido, the defendant through his attorneys, that on January 14, 1956 a safety box No. 6728 was leased at the Pioneer Trust
271 & Savings Bank by Don Schiavone; that the said Don Schiavone is the one and the same person as the defendant Nicholas Guido.

"That thereafter the box was entered by the lessee on January 16, 1956. And that on January 19, 1956 the box was entered by agents of the Federal Bureau of Investigation pursuant to search warrant and the contents removed."

Mr. Peters, will you take the stand?

Mr. Peters: Yes, sir.

The Clerk: Will you raise your right hand and be sworn?

Mr. Peters: Yes, sir.

(Witness duly sworn)

WALTER E. PETERS, called as witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

A. State your name, please.

By The Witness:

272 A. Walter E. Peters.

Q. Your business or occupation, Mr. Peters?

A. Special Agent for the Federal Bureau of Investigation.

Q. How long have you been such an agent?

A. Approximately ten years.

Q. At what office are you now assigned?

A. Chicago.

Q. Did you participate in the investigation of a robbery of the Maywood Proviso State Bank?

A. I did.

Q. Do you know the defendant Nicholas Guido?

A. I do.

Q. Do you see him in the court room?

A. I do.

Q. Would you point him out, please?

A. He is the gentleman sitting left of Mr. Gorman.

Q. Your left and Mr. Gorman's right, isn't that right?

A. Correct.

Mr. McGarr: Let the record show that the defendant Nicholas Guido has been identified by the witness.

By Mr. McGarr:

273 Calling your attention, Mr. Peters, to January 17, 1956, did you see Mr. Guido on that date?

By the Witness:

A. I did.

Q. Where did you first see him?

A. In his apartment at 1110 South Austin.

Q. Did you with other agents, participate in a search of that apartment?

A. I did.

Mr. McGarr: I would like to have this marked as Government Exhibit 18 for identification.

(Whereupon said paper bag was marked Government Exhibit No. 18 for identification.)

By Mr. McGarr:

Q. I show you, Mr. Peters, a brown paper bag marked for identification as Government Exhibit 18, and I will ask you if you have seen that before?

By the Witness:

A. I have.

Q. And where did you see that?

A. I first saw it in the closet in the front bedroom in the defendant's apartment.

274 Q. Was that one of the items taken in connection with the search of Mr. Guido's apartment?

A. Yes, it was.

Q. Was there any conversation with you or with anyone in your presence with Mr. Guido concerning this search?

A. There was a conversation in my presence when we got ready to leave.

Q. Will you identify or indicate what was said, and identify the persons who spoke, please?

A. A conversation was by Mr. Hunter and the defendant. When we were getting ready to leave this item among other items, was placed on the floor in front of him and Mr. Hunter said that he was going to take these items, and the defendant said, "You can take anything you want to."

Q. Prior to your entrance into the apartment at 1110 South Austin, did you see an automobile parked in that vicinity?

A. Yes, I did.

Q. What type of a car was it?

A. A 1955 Cadillac.

Q. What color, if you recall?

A. Black.

275 Q. Where was it parked in relation to 1110 South Austin?

A. Directly in front. That would be on the west side of Austin, facing south.

Q. At any time that day, prior to your immediate entry into the apartment, had you see that automobile?

A. I did.

Q. Will you describe the first time you saw it and under what circumstances, on January 17th?

A. I was with Agent Gillem in a Bureau car. We were traveling east on Roosevelt Road.

Q. What time of the day was that?

A. Approximately 5:10.

Q. Was it light or dark at this time?

A. As I recall, it was dark.

Q. Would you continue with your testimony, please?

A. We were proceeding east on Roosevelt Road at the intersection of Austin and Roosevelt. We were making a left turn onto Austin going north. Prior to making this left turn, we looked over into the right-hand lane of cars going west on Roosevelt Road. The first car we saw there was a black Cadillac. It had license number 1571499.

Q. What happened after that?

276 A. We turned directly in front of the car—

Q. You turned in what direction, left?

A. Left. That would be left into Austin going north.

I looked back and tried to follow the car to see if it was going straight ahead or whether it turned right, going north into Austin. It turned.

Q. It turned right?

A. It turned.

However, alongside of the car there were one or two cars in between us. It was a single line of traffic.

We proceeded on north about a block and we waited until the car could catch up with us or either pass us. However, after waiting for a few seconds, the car didn't show up, so we turned around and went back, and saw the car was parked in front of 1110 South Austin.

Q. Am I correct then, from the time you turned left into Austin Boulevard, or a few seconds after that, you lost sight of the Cadillac until you again saw it parked?

A. That is correct.

Q. Do you know who was driving the Cadillac at
277 that time when you first saw it?

A. No, I don't.

Q. Do you know how many persons were in it?

A. There was one as far as I could see.

Q. Was it a male or female?

A. I believe it was a male.

Q. When you saw the car parked on Austin Boulevard, will you describe whether there was anyone in it?

A. No.

Q. Did you see any person in the vicinity of the car?

A. No.

Q. What did you do after that?

A. After that I radioed, I believe it was Special Agent Conley that the car was now parked in front of the house, and we made arrangements to go into the house.

Mr. McGarr: No further questions.

The Court: Cross examine.

Cross Examination by Mr. Green.

A. I have just a few questions, Mr. Peters.

Now, as I understand it, when you first saw this car, this black Cadillac automobile bearing license number 1571499, you were driving in a Bureau car in an easterly direction along Roosevelt Road?

278

By the Witness:

A. That is correct.

Q. You were not driving, were you?

A. No, I was not driving.

Q. Who was driving?

A. Special Agent Gillem.

Q. You and Mr. Gillem were the only two agents in that Bureau car, is that correct?

A. That is correct.

Q. Now, where were you with relation to Austin Boulevard when you first saw that car, right in the intersection?

A. We were the first car.

Q. And you entered the intersection of Austin Boulevard when you observed that Cadillac?

A. Well, it was a question of turning.

Q. You were waiting — in other words, you were in the intersection facing in an easterly direction, and you were awaiting to make a turn in a northerly direction into Austin Boulevard, is that correct?

A. That is correct.

Q. And you were prevented from so doing because of the line of traffic that was coming along going west, is that right.

279

A. There was considerable traffic. I don't know whether the circumstances were such we couldn't turn. I just don't remember that point. We were in the left-hand turning, and conversation was going on between us, and as I recall as we turned I saw the Cadillac.

Q. The Cadillac for which you were looking? You were looking for the Cadillac bearing the license number that I have read to you?

A. That is correct.

Q. Where was the Cadillac when you first observed it?

A. It either came up then, or immediately for a right turn, or it was parked there. I can't say which because when I observed it, we were making our swing.

Q. You entered Austin Boulevard going north after your left turn before the Cadillac made its right turn following you into Austin Boulevard, is that right?

A. That is correct. In other words, we were ahead of the Cadillac going north.

280 Q. But you had, at that time, recognized the Cadillac as the car you were looking for?

A. As we turned.

Q. And because you were ahead of the Cadillac, your only view of the Cadillac was the front of the Cadillac, isn't that so?

A. Now, this is minute. When I turned I saw the front of the Cadillac. As we proceeded north, there were, maybe, one or two cars jumped with us going ahead.

Q. Yes.

A. That is the only part of the Cadillac that I could see, unless in looking back I saw the front portion of the Cadillac on the side.

Q. When was it your first recognized the Cadillac as the car you were looking for?

A. As we made this swing.

Q. As you made the swing?

A. Yes.

Q. Was that Cadillac moving at that time?

A. No.

Q. It was stopped? Was it stopped right there? Was there a stop light on that corner there?

A. Yes, sir.

281 Q. Now, did you first observe that Cadillac that you were looking for, or did Agent Gillem? Who was the first one that saw it?

A. I saw it.

Q. I think you told us on your direct examination you did not radio Agent Connolly until after you had observed that same Cadillac in front of 1110 South Austin?

A. No, I don't think I testified to that.

Q. Tell us when you first did radio?

A. I radioed as we made the swing.

Q. As you made the swing?

A. Yes. Well, I don't know whether I picked it up simultaneously with making the swing, but immediately thereafter.

Q. But you didn't wait until you saw the car parked?

A. No.

Q. That is what I am getting at.

Now, how far did you go before you turned around and came back toward Roosevelt Road? How far did you go in a northerly direction on Austin Boulevard before turning around?

A. It was approximately a block. As I recall, it was the first intersection.

282 Q. That would be 11th Street, is that correct?

A. I am sorry, but I don't remember.

Q. Well, it was the first block north of Roosevelt Road is where you made a U turn?

A. That is correct.

Q. And you did observe the black Cadillac following you into Austin Boulevard behind your car, or two cars or something?

A. It was in a single lane of traffic.

Q. How was the traffic along Austin Boulevard at that time? Quite heavy, wasn't it?

A. Not to the extent of Roosevelt. I would say, medium; not a lot of cars but some cars.

Q. Why did you go to 11th Street before making your U turn?

A. When he pulled in behind us —

Q. You are speaking of Guido, the defendant?

A. No, I am speaking about the male that was in the black Cadillac.

Q. Well, whoever was in the black Cadillac?

A. When he pulled in behind us there was a single line of traffic. In other words, let us say our car is here and he was one or two cars behind us. Our idea was to halt momentarily to see where he went so he could 283 get ahead of us, so that we could follow him.

Q. Did you halt momentarily?

A. Yes, we did.

Q. When you halted momentarily, Guido or this black Cadillac was one or two cars behind. Now, what did the black Cadillac do while you were halted a moment?

A. I didn't see it. I don't know what it did. I could only assume that he either made a U turn or pulled into a driveway, or a parkway and backed out.

Q. Now, the black Cadillac was going in a northerly direction when it entered Austin, isn't that so?

A. Right.

Q. And there is only one block between Austin and where you made the U turn?

A. Right.

Q. Yet when you saw that black Cadillac almost immediately thereafter that black Cadillac was facing in a southerly direction, isn't that so?

A. That is correct.

Q. Although you didn't leave that block? You never saw that black Cadillac until you saw it parked?

284 A. I didn't see it turn off.

Q. Although you paused only one or two cars ahead of the black Cadillac when you entered Austin Boulevard?

A. Will you repeat that, Mr. Green?

Q. You say you paused, Mr. Peters — maybe my questions are too confusing.

You say you paused. You came to a stop to allow the black Cadillac to pass you after you had entered Austin Boulevard, is that so?

A. That is correct.

Q. But you didn't see that black Cadillac make any U turn behind you?

A. No.

Q. All right, now where is 1110 South Austin Boulevard. That is at, is it not, almost at the northern extremity of that block?

A. No.

No, I would say that splitting the block in half, it is in the southern part of the block.

Q. 1110 is in the southern part of the block?

A. Well, this first block, I don't know how the numbers run, but it would be more toward Roosevelt Road than it would be the first intersection there.

285 Q. How far along that block had you gotten when you made this stop to allow the Cadillac to pass you?

A. I believe it was about one block.

Q. You went almost to the northern end of the block, is that right?

A. That is right. Where we could, as I recall, what we were trying to do was stop and let it pass.

Q. It was quite dark at that time?

A. I beg your pardon?

Q. It was quite dark at that time?

A. It was dark. It was not pitch dark. It was quite light at the intersection where the stores and things were, but up on Austin Boulevard it would be darker because there were some trees there.

Q. In any event, you were unable to recognize the man who was driving the car?

A. No, I couldn't—

Q. You couldn't recognize him?

A. No, sir.

Q. You had seen pictures of him, had you not?

A. Yes, sir.

Q. But you were able to read this license number 1571499?

286 A. I was.

Q. On which plate?

A. The front plate.

Q. When?

A. When I first saw the Cadillac.

Q. You knew that the other agents who were out on this investigation in the neighborhood of the apartment were possessed with a warrant at that time for the arrest of the defendant, didn't you?

A. I knew there was a warrant outstanding.

Q. For his arrest?

A. For his arrest.

Q. And that was your purpose in being there to make an arrest, isn't that so?

A. That is correct.

Q. And you knew that the defendant would probably be driving an automobile bearing license number that I

have read, and the description that I have given you, is that so?

A. That is right.

Q. When was it that you first entered the apartment of 1110 South Austin, the apartment occupied by the defendant Guido?

A. It was approximately 5:15 or around there.

287 Q. You remained there until around 6:35?

A. Probably 6:25 or 6:30.

Q. And where was Mr. Guido during that period of time?

A. Well, generally, the place where he stayed most of the time was in the living room.

Q. Well, he stayed there all of the time, didn't he? He was under arrest at that time, wasn't he?

A. That is right.

Q. And he was under arrest at the time that this bag and these other articles were shown to him, isn't that so?

A. That is correct.

Q. And he had been under arrest? You said it was right before you left, and he had been under arrest for at least an hour, isn't that right?

A. That is right.

Q. Who was in charge of that phase of the investigation? I mean the investigation that was in progress that day at or around 1110 South Austin Boulevard?

A. Well, before we spotted him I would say Agent Connolly was in charge.

Q. And thereafter?

288 A. Connolly went in and made the arrest. He was still in charge. I would say that Connolly was in charge of the whole situation, but Hunter, I believe, divided up the rooms we would search.

Q. What capacity did Agent Spencer serve that day?

A. I would say that he was strictly an observer there.

Q. Did he come there?

A. He was not in the apartment.

Q. He was not in the apartment?

A. No. I didn't see him in the apartment.

Q. And Leonard Wolf. Let me ask you about him. What was his capacity?

A. Just another agent.

Q. He was in the apartment, wasn't he?

A. Yes.

Q. And the same for Agent Joseph Wheeler — Joe Wheeler?

A. Yes, sir.

Q. Who was stationed in the front of the apartment in the hallway?

A. As I recall, Connolly, Hunter and there were other agents. I can't recall who they were. I was at the back door when the arrangements were originally made.

289 Hunter and Connolly and one other agent was to go to the front door.

Q. For how long that day had this apartment been under surveillance?

A. I got there, and I think I was one of the first, I got there about 10 o'clock.

Q. About 10 o'clock in the forenoon?

A. Yes.

Q. Was Agent Hunter there when you arrived?

A. As I recall, he was not.

Q. He was not?

A. No.

Mr. Green: I think that is all.

Thank you.

The Court: Wait a minute, maybe he wants to ask you some questions.

The Witness: Yes, sir.

Redirect Examination by Mr. McGarr.

Q. You testified, Mr. Peters, that while driving down Austin Boulevard you were halted waiting for the Cadillac to pass?

By the Witness:

A. Yes.

290 Q. How far from the intersection of Roosevelt Road had you driven before you halted?

A. Approximately one block.

Q. Had you kept the Cadillac under observation during the course of driving that block?

A. I had attempted to, but I couldn't see it because of one line of single traffic going north, and there were cars in between me.

Q. How long did you wait after you stopped for the Cadillac to go by?

A. As I recall, there were several cars; there were one or two cars between us. We let them pass and then there were others and we kept watching for this car. I can't recall how long we waited. It was not too long. We waited unutil the traffic cleared and then we made a turn.

Q. Now, how far back on the other side of the street in that block did you drive before you saw this Cadillac parked?

A. After we made our U turn?

Q. Yes.

A. We drove past the residence.

Q. My point is, after you made your U turn, how far back toward Roosevelt Road did you drive before you

291 came to the residence? Did you come to it immediately, or was it up a block?

A. No, it was not immediately. It was more toward Roosevelt Road.

Q. Do you know whether the east and west sides of

Austin Boulevard in that area are in the same city or in the same village?

A. The west side, I believe, is a part of the Village of Oak Park. The east side, I believe, is Chicago.

Mr. Green: I object to that. They have the same numbering system as in Chicago, your Honor.

Mr. McGarr: I don't think so. That is the purpose of the question.

The Court: Sir?

Mr. McGarr: I don't believe the numbering system is the same. That was the purpose of my question.

The Court: I don't know whether it is or not, but what he stated, there isn't any dispute about that is there? That is the dividing line between the two municipalities?

292 Mr. McGarr: Yes, sir.

By Mr. McGarr:

Q. You testified that you commenced your surveillance at about 10:30 in the morning, or about that time?

A. Yes, sir.

Q. Were you to be relieved by other agents at any time?

A. Yes, I was.

Q. At what time?

A. At 6 o'clock that night.

Q. Did the agents who were to relieve you, relieve your surveillance group, arrive?

A. Some of them did arrive.

Q. Did they participate in the search?

A. They did.

Mr. McGarr: No further questions.

The Court: Is there anything further?

Mr. Green: Yes, there is, your Honor.

Recross Examination by Mr. Green.

Q. At that point along Austin Boulevard to the west lies Oak Park, and to the right is Chicago? That is, facing north? That is correct, is it not?

293 By the Witness:

A. That is correct.

Q. Well, isn't the numbering system the same from 1100 on 11th Street to 1200 on Roosevelt Road, both in Oak Park and also in Chicago?

A. I am not familiar with the numbering system.

Q. Don't the numbers in Oak Park run in progress scale upward, as do those south? In other words, isn't 1120 South of 1110? Isn't that the way it runs? Just like Chicago?

A. I would assume it does, but I am not — I never noticed it.

Q. I would like to go back on this which Mr. McGarr touched on for a minute, Mr. Peters.

How far from 11th Street was it, as you best recall now, that you and Agent Gillem came to a stop to allow these cars to pass you?

A. My recollection, Mr. Green, is that it was approximately a block. I mean — I can't recall any more detail than that.

Q. How far from 11th Street is the address of 1110 South Austin Boulevard?

A. I don't know that there is an 11th Street.

Q. Let us call it the street north of Roosevelt

294 Road?

A. I couldn't say, only my recollection is that it is more toward Roosevelt Road. From our position, the apartment 1110 — where we stopped, and the position of 1110 South Austin would be, if you were to divide that distance in half, it would be nearer Roosevelt Road.

Q. By how much would you be able to say, or could you say?

A. I couldn't say. I wasn't thinking about that. I wasn't measuring the distance at the time.

Q. That block is only, I presume, a 260-foot block, isn't that correct? It is the usual block, isn't it?

A. When I use the term "block" I mean a regular sized city block.

Q. I will try to make this clear, and you tell me if I am wrong on it.

Where you stopped in that block it could not have been more than 150 feet from the front of the apartment at 1110 South Austin, isn't that so?

A. I can't say that. My recollection is that when we turned around it was closer to Roosevelt Road, toward that half. I was not paying any attention particularly
295 to what the house number was. I was concentrating on the car.

Mr. Green: Thank you.

The Court: Is that all?

Mr. Green: That is all.

The Court: Do you have any other questions?

Mr. McGarr: Yes, sir.

Redirect Examination by Mr. McGarr.

Q. After the U turn into Austin Boulevard you went back toward Roosevelt Road a half a block or more before you parked?

By the Witness:

A. Will you state that again?

Q. After you made your U turn and proceeded back toward Roosevelt Road, do I understand you traveled a half a block or more before you came abreast of the black Cadillac?

A. That is approximately correct.

Q. Now, going back to your turning right on Austin Boulevard, I believe you testified that you stopped at the first intersection to make a U turn?

A. That is my recollection that we did.

296 Q. I mean, when you turned left you proceeded in a northerly direction on Austin Boulevard?

A. Yes, sir.

Q. And you stopped at the first intersection?

A. My recollection is that we did.

Q. Do you recall whether you passed an intersection on the other side of Austin Boulevard, the street that did not go through?

A. I can't answer that. I wasn't interested in that point at that time.

Mr. McGarr: No further questions.

The Court: Anything further?

Mr. Green: Nothing further, your Honor.

The Court: That is all, Mr. Peters.

The Witness: Thank you.

(Witness excused)

Mr. Green: Do you have any other witnesses at this time?

Mr. McGarr: I have a few withesses after two.

Mr. Green: At this juncture, your Honor, I understand from Mr. McGarr that he has the agent's testimony in regard to the search of the apartment. There is a motion that Mr. Gorman and I would like to be heard on to considerable extent, prior to the time the next

297 witness takes the stand if you believe that this is the time for it. Do you think we should go into that matter now?

Mr. McGarr: That is right, your Honor, I have some witnesses coming in at two.

The Court: The jury may take a recess.

(Whereupon the following took place outside of the presence and hearing of the jury.)

The Court: Proceed.

Mr. Gorman: If the Court please, at this time it becomes apparent to the defense that it is the Government's intention to have some testimony regarding the articles which were seized in the apartment at 1110 South Austin Boulevard on the 17th of January, 1956.

We wish to be heard on a motion to suppress the introduction into evidence of any such articles that were taken during the course of that search.

Our motion is based or bottomed on the three principles, any one of which we believe will support the suppression of the use of that evidence:

The first principle which we wish to advance to the Court in support of our motion is this was an arrest
298 of convenience. I think that anyone after having listened to the testimony of the agents who have just testified in this matter, could come to no other conclusion but that those agents made this arrest in the apartment, which they made this arrest in at 1110 South Austin Boulevard, only and solely for the purpose of being able to try and justify or color any search that they made in connection with that arrest on the basis that the search was made incident to such arrest.

The second basis for our motion, the second principle which we wish to discuss with the Court, is that the search itself was of such a nature as to fall within the condemnation of many cases in the Supreme Court and the lower courts which have condemned rummaging and exploratory searches. We have the testimony of the agents who participated in this search that there were at least ten agents in the apartment, and that those agents were in the apartment for well over an hour, and they went through every room in the apartment.

The third principle upon which we are basing our motion to suppress this evidence is that the articles seized are such things that no way come within the purview 299 of the Fourth Amendment of the United States which sets up the principles upon which a search warrant can be obtained, and what things can be seized under a search warrant, and also Rule 41(b) of the Federal Rules of Criminal Procedure.

I think it is axiomatic that no greater search can be made without a warrant, that is in a search incident to an arrest, than a search that could be made pursuant to a search warrant where the officers have first sought, as our courts and the Supreme Court have constantly repeated and stated, that some judicial officer should pass on the question of whether or not a search is to be made in any given place, and what articles should be seized pursuant to their search.

Now, with reference to point 1, that is the convenience, that this was a search of convenience, I do not think it would be amiss if we review briefly the testimony of the agents that have testified concerning this search:

The first of those agents who testified was Agent Hunter. Agent Hunter testified that he arrived at the apartment at 1110 South Austin at about 2:30 or 3 300 o'clock in the afternoon; that he was accompanied by agents Connolly, Wolf, Wheeler, Peters, and Gillem, and that he and Agent Connolly took up a post in front of the apartment, and that Peters and Gillem were assigned to a post in the rear of the apartment.

Then in connection with activities that went on at the scene, the next agent that testified was Agent Sell. Agent Sell testified that he arrived at around 5:10 in the afternoon at the scene of the arrest at 1110 South Austin Boulevard, and that he was with Agent Wolf and Agent Wheeler, and that Agent Wolf was in charge of the investigation.

Agent Connolly testified, and it was testified by other agents, that he was in charge of the arrest feature of that investigation; that he arrived at the scene at 10 o'clock in the morning.

Agent Gillem testified that he and Agent Peters observed at Austin Boulevard and Roosevelt Road a Cadillac car, a black Cadillac car, and gave the specific license number; that he and the other agents were possessed of information that that Cadillac car was being driven by the defendant, it was being used by the defendant, Nicholas Guido.

301 Both he and Agent Peters have testified to observing that car at Austin Boulevard and Roosevelt Road, and to making a left turn in front of that car and proceeding in a northerly direction down Austin Boulevard. That they observed this car make a right-hand turn behind them.

Now, there are many inherently unbelivable statements in connection with the testimony of the agents, and I know your Honor has observed them both in the direct and cross examination.

Now, they entered the 1100 block of South Austin Boulevard and proceeded in a northerly direction, the agent testified, Agents Gillem and Peters, and they were one or two cars ahead of this Cadillac car which they claimed to have identified, identified by the license number, although both agents testified that it was dark at the time that they made this obeservation. It remains a matter of credibility that they were able to identify the license number and unable to identify the occupant of the car, other than to say he was a male person.

As they proceeded in this northerly direction down this block a short distance, that Agent Gillem was driving,

302 and Agent Peters was keeping the car under observation, and that somewhere in that block they lost sight of this car.

That they went to the next corner—we will call it for convenience 11th Street. It is the first block south of Roosevelt Road which, as we all know, is 1200.

The Court: The first block south or north?

Mr. Gorman: Pardon me. I beg your pardon. The first block north of Roosevelt Road, and the numbers go in a southerly direction at that point. We will call it 11th Street for convenience.

That they failed to observe this car behind them; that they lost track of it. That they made a U turn, and when they came back going in a northerly direction on Austin Boulevard they observed this car in front of 1110 South Austin Boulevard on the west side of Austin Boulevard, and that it was unoccupied at that time. And that all of this took a matter of some few seconds, I think, according to their testimony.

Now, under those circumstances, it is our contention that they add up to an inherently unbelievable story, and 308 here, again, we have a situation where the police officers seeking to—well, in an over-zealous manner, make an arrest and to make it in a convenient location so that they might make a search incident to that arrest, have fallen again into the vice which the courts have condemned time and time again in connection with what we term arrest of convenience.

It might also be well to point out to the Court at this juncture, that according to the testimony of the agents, they had the front of the apartment under surveillance. Yet, at the time this car pulled up in front of the apartment we have no evidence, no testimony, from them that anyone saw the car pull up in front of the apartment; saw the defendant get out of the car, or saw him enter the building at that point.

I would like to call the Court's attention to the language in McKnight *vs.* United States in connection with this

point. In the McKnight case, cited at 183 Fed. 2d, 977 at page 978, the court in discussing the tactics of the police in making an arrest with a warrant of arrest, and it had this to say:

"The police planned to and did reject a convenient present opportunity to make a lawful arrest in a public street and, without a search warrant or enough information to get one,—"

And I might add parenthetically that that is our identical situation here.

"—broke into a house in order to seize evidence they hoped to find there. They found it and seized it. We think this is a plain violation of the prohibition in the Fourth Amendment of the Constitution against unreasonable searches and seizures. The government argues that what it aptly calls a 'police strategem', waiting until McKnight was in a locked house before arresting him, justified the police in breaking into the house in order to arrest him and seize evidence. We think this untenable."

And reading further from the opinion, the opinion states:

"The Supreme Court has specifically held that 'An arrest may not be used as a pretext to search for evidence.' United States *vs.* Lefkowitz, 285 U.S. 452."

Now, we feel strongly that in so far as that point is concerned, if your Honor please, that this arrest was an arrest of convenience, and that the testimony of the agents in connection with the surrounding circumstances in connection with the arrest do not add up to any other, and cannot add up to any other conclusion that they have fallen within the tactics which have been condemned time and time again by the courts, and that based on that principle alone the use of the shoes or the use of any other items in the apartment should be condemned and should be suppressed.

Over and above that, we have, again, the type of search which was conducted in the apartment. It has been testified to that this was a 6-room apartment, and that all of the rooms in the apartment were searched; that all of the closets were searched, and that there is no doubt but what this was a general exploratory rummaging type of search for evidence that the courts have condemned, and condemned time and time again.

306 I don't believe the Government can justify that phase of the search here, even under the dictum, wording, and the language of the Harris case. That is United States *vs.* Harris, 331 U.S. 145, in which the Supreme Court approved a search of an apartment, a 4-room apartment, where the officers had a warrant of arrest, and where they stayed in the apartment for a considerable length of time. But it can be distinguished on the ground that what was found in the apartment in the Harris case were draft cards, the possession of which was an offense, a crime against the United States, and based upon that principle, the Supreme Court did state that in the Harris case the search in their opinion was not such a search that fell into the condemnation that we have heretofore been speaking about.

The third principle upon which we are basing our motion to suppress the evidence is that the right to search when the defendant is arrested is no greater when a search is made pursuant to a warrant of arrest, and incident to arrest, than could be made under circumstances wherein a search warrant had been issued.

307 Congress has seen fit in the course of the years to narrowly circumscribe what may be seized among a person's papers and personal effects at the time that a search is being made, either incident to an arrest, or being made as a basis or under the authority of a search warrant.

At this time I would like to briefly read into the record just what the Fourth Amendment has to say in connection with this. That is, the Fourth Amendment reads:

> "The right of people to be secure in their person, houses, papers and effect against unreasonable searches seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things, to be seized."

In that same connection, Rule 41(b) of the Federal Rules of Criminal Procedure states:

> "(b) GROUNDS FOR ISSUANCE.
>
> "A warrant may be issued under this rule to search 308 for and seize any property.
>
> "(1) Stolen or embezzled in violation of the laws of the United States; or
>
> "(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
>
> "(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., 957."

Now, it is our position that the articles seized in the apartment at 1110 South Austin Boulevard were such articles which could not be seized under any circumstances; that those were articles of a purely evidenciary nature and do not come within the purview of the Fourth Amendment, the meaning of the Fourth Amendment, as the courts have stated, or Rule 41(b) of the Federal Rules of Criminal Procedure.

Now, in this connection we find that the Supreme Court had this to say in Gouled vs. United States 255 U.S., 65 Lawyers' Edition, 647 at page 652.

309 "The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,' searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the Boyd case 116 U.S. 619—"

And citing other cases.

310 "—and Weeks case, 232 U.S. 383, in which it is pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coins, burglars' tools and weapons, implements of gambling 'and many other things of like character' might be searched for in home or office and if found might be seized, under search warrants, lawfully applied for, issued and executed.

"Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks cases, supra,

they may not be used as a means of gaining access
311 to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."

Citing the Boyd case 116 U.S. 623, 624.

In the same connection the Supreme Court had this to say in the Lefkowitz case, cited in 285 U.S. 452, at page 461. In this case there was also a search conducted in an office after lawful warrants of arrest had been issued for the defendant, and certain property was taken from the office in connection with the search incident to arrest.

The Supreme Court—a motion was made to suppress
312 that evidence—and the Supreme Court had this to say:

"The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrests. And that must be decided on the basis of valid arrests under the warrant. Save as given by the warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of re-

spondents' guilt of crime, whether that specified in the warrant or some other offense against the Act.
313 Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

"The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy."

Citing Byars vs. United States.

"Its protection extends to offenders as well as to the law abiding."

Citing Weeks vs. United States and Ignello vs. United States.

"The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what
314 searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

Citing United States vs. Kirschenblatt.

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were."

Citing Gouled vs. United States, which we have previously cited. Continuing the opinion, page 465:

315 "Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime."

Citing the Boyd case, the Weeks case, the Gouled
316 case, and the Carroll case.

Certainly I believe there is not question that under the circumstances of this search and the nature of the things seized here, that it is obvious that they come within the prohibition of the Fourth Amendment, and that they come within the prohibition of the things which could be seized; could be legally seized pursuant to Rule 41(b) of the Federal Rules of Criminal Procedure. In that connection I would like to read, if your Honor please, from one more case. This is Rose vs. St. Clair, 28 Fed. 2d, 189.

In this case the officers seized some fight film which after having a warrant of arrest for the defendant, and the offense charged in this case was the interstate transportation of such film. The court had this to say in suppressing the evidence here:

"It follows, whether authority for the issue of the search warrant in the instant case be based on the act or 1917 * * * or on some previous rule of law, that there was no right to issue the warrant here
317 unless the films had been used as a means of committing a felony."

Underscored.

"It may be assumed that the property used as a means of committing an element of a felony is within the meaning of the law. However, the films in this case were not used as a means of committing the overt act of transportation. An object which is transported (if without power to move itself) cannot be a means of effecting transportation. In no sense were the films a causative agency or objects through which, or by the help of which, the transportation was accomplished. The motorcar, or the railway engine, whichever was used in the transportation, was a means of accomplishing the violation of the act of 1912: but the films were not. A jimmy could be used as the means of committing a burglary; but the silver spoons carried away by the burglar could not be.

318 "If the search-warrant statute had been so phrased as to include property which had been used in connection with the commission of a felony, the statute might embrace the case at bar. But no such language was employed, and the words used by the lawmakers cannot properly be construed as including any property, except such as was used as a causative agent or instrumentality, by the help of which a felony, or at least an element of a felony, was committed.

"It may be added that there is every reason for a strict and precise reading of the words 'used as a means of committing a felony.' No process known to the law is more obnoxious or more provocative of

resistance than a search warrant. Moreover, there is no reason for a broad construction. Property which has been stolen or embezzled is provided for by the first section of the statute in question; other property, which may not be legally possessed, is pro-
319 vided for by other statutes or by the common law, and consequently there was no reason for an intent that the second section of the act of 1917 should embrace property connected with the commission of a felony otherwise than as a causative agency or as a causative instrumentality. It seems to me to follow that the affidavit in this case did not state any fact which authorized the issuance of the search warrant, and consequently that the seizure was illegal."

Now, I might add just a statement, if your Honor please, in connection with the Lefkowitz case. The case of Sidney Steinberg *v.* U. S., 352 U.S. 819, Judge Justice Douglas had this to say in commenting upon the search of personal effects and seizure of papers of the defendant.

"Such a search of the papers and effects in San Francisco violated the Fourth Amendment. The situation is analogous to that in the United States *v.* Lefkowitz, 285 U.S. 452, recognized as still the
320 law. In United States *v.* Renowitch, 339 U.S. 56 at page 62."

It is our earnest contention, your Honor, that the articles seized here should be suppressed and should be suppressed on any one of the three principles of law which we have stated here. That this was a search of convenience; that the officers chose to make this arrest in the apartment so that they might conduct this rummaging search, and that the things they seized were not the things which are subject to seizure within the purview of the law.

The Court: You say they are not subject to seizure under this procedure because they were not used as the means of the commission of the crime. But they might indicate evidence of the commission of the crime?

Mr. Gorman: They are merely evidenciary.

The Court: All right, Mr. McGarr.

Mr. McGarr: I will address myself to this, your Honor, under the same general framework used by Mr. Gorman.

First, whether we have here an arrest of convenience in the apartment because the outstanding warrant should have properly taken place elsewhere. First, there
321 seems to be some confusion as to some of the testimony as to whether there was any surveillance of the front and rear doors of this apartment at the time the defendant entered. I don't think there was, nor was there any evidence tending to indicate that.

Mr. Hunter testified, and perhaps his sentence was confusing, something to the effect that of taking up a post where he could observe the front door, and somebody else taking up a post where they could observe the rear door, but all of that related to the early morning.

The testimony was made very clear that the first time anyone saw the defendant Guido was when Gillem and Peters saw him making a right turn on Roosevelt Road.

The testimony was equally clear that at that time all of the agents were in an automobile, and that the surveillance consisted of a car making what the witness called a pass in front of the apartment from time to time, driving past the apartment to see whether the car they were looking for could be observed.

The testimony of Gillem and Peters as to the first
322 time they saw the car, their testimony is that they saw a man driving it and they had not seen Guido, only pictures of him, and they were not certain that this was

Guido. The first time they saw his car it was parked. This is what I am sure your Honor recognizes as a commercial and lighted intersection at Austin and Roosevelt Road.

They were able to see the license number because of the lights, although it was light or dark, this being the month of January. It is not inherently unbelievable that under such circumstances they could see a license number and not recognize the individual in the car for many reasons, one being the fact that the individual in the car was under the shadow of the roof of the car, and so forth. I need not go into too much detail on that. I am sure your Honor is more familiar with these circumstances and the interpretation to be placed upon them than I.

The testimony was that in turning into Austin Boulevard ahead of the black Cadillac they proceeded to a block which the defense characterizes as 11th Street, but which the witness does not know as any particular 323 street. At that time they made a U turn and came half way back in the block before they found the defendant in front of 1110.

Now, much is made of the fact that they couldn't come half way up the block before they found the defendant at 1110. But your Honor could almost take judicial notice of the fact that the east and west streets on the Oak Park side do not correspond to the east and west streets on the Chicago side. What is a block on one side of the street, or proceeding to the first intersection, might pass two or three intersections on the other side. The address does not prove the inherent falsity of the agents' story as the defendant would have you believe.

Now, with reference to the addresses, the agent said he came back a half a block before he saw the car, and he does not know how they Cadillac was able to make a U turn and be parked at that particular time.

In any event, what has happened here is that the agents have described the circumstances as to where it was,
324 and it is completely unfeasible if not impossible to put the defendant under arrest in a circumstance where the agents saw themselves taking a parallel course down a busy street, in the same direction as the car which they were seeking, without a certainty that Guido was the man in that car, and with two or three intervening automobiles being there. They did the only thing they could do, they stopped to let him go by so that they might get in behind him. When he did not go by, they made a U turn and located his car, and entered the apartment in front of which it was parked, the apartment they knew to be his, having a warrant at the time.

I think the arrest of convenience there is one that is completely unsupported by the facts, and I think the agents' act is the only way that they could reasonably under the circumstances make the arrest. That is the only place they reasonably could under the circumstances.

Mr. Gorman has relied in connection with the arrest of convenience on the McKnight case, and in the quotation from the McKnight case he mentioned the court admonishing the police that they did not take advantage
325 of a quote, "convenient and present opportunity to arrest and thereafter broke into the house.

I think it is clear that the agents here had no convenient and present opportunity to arrest Guido before they entered his apartment.

Secondly, I address myself to the reasonableness of the search, and whether it was reasonable to have arrested Guido within his apartment and to search the apartment.

Our own 7th Circuit, if I recall correctly, in Ignello v. United States—and the reason I say I must recall it, is that the citation I have here is 269 U.S. 20, in a case affirmed by the United States Supreme Court, excluded the

search of a dwelling several blocks from the dwelling in which the arrest was made. But in the same decision it held proper the search of the entire dwelling in which the arrest was made in that case.

The United States Supreme Court in Harris *v.* United States, 331 U.S. 145 held that the search of all of a 4-room apartment where the arrest was made was a proper search.

And somewhat unrelated to this but I will mention
326 it because it has come up, the case of United States *v.* Renowitch, 339 U.S. 56, a man was arrested in his office, and the United States Supreme Court held proper the search of the entire office, including desks, the safe, and filing cabinets.

The search incident to the arrest of a dwelling in which a man is arrested if properly arrested in that dwelling has been held by the Supreme Court on several occasions to be a proper and reasonable search.

That is exactly what we have here. We have an arrest in a dwelling which is a proper arrest and search of that dwelling, and I doubt that in any way it could be differentiated from the many instances in which the Supreme Court has held such a search was valid.

Finally, we reach the third point and that is that the articles ceased are not within the purview of a proper search warrant:

Now, I cannot quarrel with the proposition that the search was incident to an arrest with a search warrant.

As I said, I agree with that.

327 But the point is, what a person may seize in a search incident to arrest as mentioned by the defense and as interpreted by the courts, is not as limited as counsel would have you believe. Even looking at Rule 41 of the Federal Rules of Criminal Procedure, that we may see something used as means for committing a criminal offense, we have seized here—and all of this argument is

about one thing, a pair of shoes. We have seized here a pair of shoes which the Government's evidence will demonstrate and which it was known then by the person seizing them, because they were looking for a pair of shoes, as the pair of shoes that were used in a bank robbery. The heel print on those shoes with the brand name available was seized because that same heel print was found in the bank.

Those shoes were used as a means for committing a criminal offense. It is not a strained interpretation of Rule 41 to argue that, and the other interpretation, I think would be completely inconsistent with the decisions on the point.

For instance and probably the most appropriate to
328 this discussion is the United States Court of Appeals, District of Columbia decision in 1945, Morton v. United States, 147 Fed. 2d, 28. Certiorari denied, 324 U.S. 875. Therein was a search of a dwelling incident to an arrest. Among the things seized, and this was a murder case, was a sports shirt and a pair of trousers taken from a closet. The Court said of that:

> "It is contended, on behalf of appellant, that the trial court improperly admitted in evidence a sport shirt and a pair of trousers taken from his closet and a partly filled bottle of whiskey and a newspaper taken from a table in his room. Appellant properly conceded that an officer making a lawful arrest on a criminal charge may take such articles as may reasonably be used as evidence; but here, he says there was no arrest on a criminal charge at the time the articles were taken."

The Court then goes on to hold that there was a proper arrest, and the defendant has been notified that he was under arrest, and the admissibility of the shirt and
329 the trousers in evidence was allowed on the strength

that it was a proper search incident to the arrest. The significant thing about it is that the shirt was used solely because it had blood stains on it and was the shirt worn by the defendant at the time of the trial.

The Court: At the time of the trial?

Mr. McGarr: I am sorry, your Honor. I mean at the time of the crime.

It would be hard to find a case more closely analogous to the pair of shoes situation than that, where we have a garment worn by the defendant seized, and the court held the seizure was proper.

In Shettel vs. United States, 113 Fed. 2d, 34, and once again the Court of Appeals for the District of Columbia, a 1940 case, the court said:

"The arrest being lawful, it was equally lawful to search appellant and to use, on the trial, the incriminating evidence found in his possession. As we said in Maynard vs. United States, when an officer makes a lawful
330 arrest, even without warrant, he may search the person of the accused for the instruments, fruits and evidences of the crime. It follows that the lower court properly overruled the motion to quash and to suppress."

And in the Maynard case which is United States—I mean, Maynard vs. United States, and this was a 1927 case, the Court of Appeals for the District of Columbia, the Court said and cites in support thereof several other cases:

"When there has been a lawful arrest without a warrant the officer making the arrest has certain well-recognized rights and duties respecting a search of the defendant's person and property and the seizure of property in his possession. He may search for the instrument, fruits and evidence of the crime."

And in support of that proposition which is a quote within a quote, there is cited the case of Sayer vs. U.S., Circuit Court of Appeals, 2 Fed. 2d, 146. United States vs. Welsh 247, Fed. 239.

331 "Even to the extent of searching the building in which the crime was committed—"

Although we do not have that here.

"—so far as controlled by the defendant."

It must not be presumed that because an article ceased in a legal search is used as evidence in a trial that it was seized as evidence, rather than a proper seizure which might properly have been carried out and done in connection with the arrest.

The point that I make is that if it used as evidence in the trial does not characterize it as evidence at the time of seizure. The agents went into that apartment looking for an instrumentality of the crime, the shoes worn during the course of the crime. They had a description of them. They knew exactly what they were looking for. It was not rummaging. And many of the things observed by the agents, as the evidence brought out, were not seized. But, in fact, these particular shoes were seized because incident to a proper search the Government had every right

332 to seize them, and we think they are clearly admissible in evidence.

The Court: Is that the only exhibit involved in this long discussion?

Mr. McGarr: I believe it is.

Mr. Green: I think that is the only exhibit other than the $10.00 bill that was ruled on.

The Court: That is out.

Mr. Green: And the bag.

Mr. McGarr: I didn't offer the bag.

Mr. Green: The shoes and the bag are the only two exhibits involved.

Mr. McGarr: That is right, the bag and the shoes. The shoes are the heart of the case.

The Court: I think there is quite a distinction between the shoes and the bag.

Mr. McGarr: As to the bag, of course, at the time the agents searched the apartment, they knew that the $2.00 bills had been spent in Sears Roebuck, and they seized the bag because it was a Sears Roebuck bag.

Now, that might be characterized as seizure of evidence.

The Court: Well, let me ask these gentlemen here this, suppose your client had been wearing these shoes would they have seized them then?

Mr. Green: On his person?

The Court: Yes.

Mr. Green: I don't think a person would be compelled to show his foot print, and it has been ruled, I think, that it is not a violation of a privilege.

But in order to enter, our point is this, in order to make a search, and to take materials which are evidentiary only, it is within the prohibition of Rule 41(a) that in order to take anything under 41(a) it has to be something to the effect which is contraband. It has to be the instrumentality of the crime. A causative agent, as has been described in the cases. It has to be counterfeit money. It has to be the various types of things which are inherently bad to themselves, which it says in the rule. And merely to get evidence is outside of the rule.

Mr. McGarr: Referring to Rule 41, paragraph 2, it says:

"(2) Designed or intended for use or which is or has been used as a means of committing a criminal offense;—"

Mr. Green: It says: "As the means—".

Mr. McGarr: Well, what is the means of robbing a bank?

Mr. Green: There are means of robbing a bank.

Mr. McGarr: It is the many things that go to make it possible, the automobile, the guns, the clothing that defendant is wearing, the mask he had on his face.

Mr. Green: The mask he had on his face, and the guns, without question. Those are the means.

Mr. McGarr: And the clothing. He wouldn't rob a bank barefooted or naked, in order to go in unconspicuous.

The Court: Let Mr. Gorman finish his argument.

Mr. Gorman: In reply to Mr. McGarr, I think we don't have to again go into the circumstances surrounding what the FBI Agents testified to. I think the conflict in their testimony was obvious in the Government's case. And certainly, they could have stopped this car and taken the occupant into custody when they first saw this car. I don't believe there is any quarrel about that, and it
335 falls exactly within the purview of the McKnight case.

In so far as adopting a convenient place to make the arrest, they should have stopped him when they first saw him. Their testimony is that they stopped to let him go by. But that he never went by and he was only in that block. And he would have had to make a U turn some place in that block to get to the other side of the street, because that car wound up parked on the west side of the street, facing south, and when they first observed it, it was moving in a northerly direction on the east side of the street.

In connection with the reasonableness of the search, the cases cited by Mr. McGarr, the Harris case, the Ignello case, and the Renowitch case, all fall within the purview of those cases wherein a crime was being committed in the presence of the officers. What was seized there was evidence of a crime being committed in their presence.

In the Ignello case it was narcotics, I believe. In the Harris case it was the false draft cards, and in the Reno-

witch case it was forged stamps, Federal stamps.
336 So, I don't believe any of those cases are applicable to the situation that we have here.

Now, as to the cases cited by Mr. McGarr, in the Morton case from the District of Columbia, that case was where the court stated in passing on that, that the motion to suppress had not been timely made, and they refused to hear it on those grounds, as I read the case very briefly in going over it.

In the Shettel case and the Maynard case, there is no statement as to what the property was that was seized. We believe that it is clearly only those things that can be seized in the search of a person's home are things which are of an evidentiary nature, not such things as are causative agents in the commission of crime, but things which actually are those means by which the crime is committed. It is on that basis we feel that the pair of shoes should be suppressed.

The Court: Well, so far as this thing you folks have been talking about as an arrest of convenience, the only evidence that has been introduced here is that none of the agents of the government saw the defendant until they
337 came across him in the house in which he lived at the time they made the arrest.

Now, it is all right to conjecture whether or not they saw him in a certain automobile, and whether they could have done certain things or not. But the only evidence before the Court and this jury is the fact that the first time these agents saw the defendant on the day of his arrest was at the time of the arrest in his house.

Then we come down to the question about the shoes. Rule 41 definitely provides that a warrant may be issued for search and seizure of any property. The substance of that is in paragraph (b) of Rule 41, and the second subdivision (2) which is as follows:

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense."

It is the position of the Government that the shoes were used as a means of committing the offense charged in this indictment.

Now, I don't think anybody will dispute the fact that if on the occasion of his arrest the defendant had
338 been wearing these shoes, they could have properly been seized at that time and used as evidence in this case. For the reasons that I have just mentioned, I think your motion to suppress the evidence as far as these two shoes are concerned is overruled.

We will resume at 2 o'clock.

Mr. McGarr: Your Honor, I think the Government will rest late in the afternoon.

The Court: You will rest late this afternoon?

Mr. McGarr: Yes, sir.

The Court: Then you don't want to go ahead until tomorrow?

Mr. Green: No, sir.

The Court: Then we will adjourn now until 2 o'clock.

(Whereupon further hearing in the above-entitled matter was continued until 2 o'clock p.m., Tuesday, April 30, 1957.)

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IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 56 CR 62) • •

Before Judge Igoe and a Jury,
Tuesday, April 30, 1957,
2:00 o'clock p.m.

Trial resumed pursuant to adjournment.
Present:
Same as before.

AND Thereupon, the following further proceedings were had herein.

340 The Clerk: Case on trial.

Mr. McGarr: We will call Mr. Thompson.

The Clerk: Will you raise your right hand and be sworn?

(Witness duly sworn).

CURTIS E. THOMPSON, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. State your name, please.

By the Witness:

A. Curtis E. Thompson.

Q. Your business or occupation, Mr. Thompson?

A. I am a Special Agent for the FBI. Federal Bureau of Investigation.

Q. To what branch or office are you assigned?

A. I am assigned to the FBI Laboratory in Washington, D. C.

Q. How long have you been a Special Agent?

A. Over 15 years.

Q. How long have you been assigned to the la-

boratory?

341 A. Practically all of that time.

Q. What is the nature of your work in the FBI Laboratory?

A. I am assigned to examine various items of evidence including shoe prints, tire treads, typewriters, and things of that nature.

Q. Have you ever been an instructor in this field? This field of evidence examination?

A. Yes, I have instructed in various police organizations, and FBI Schools in Washington and throughout the country.

Q. Have you ever testified as an expert witness before?

A. Yes, I have.

Q. On approximately how many occasions, if you recall?

A. Oh, well over a hundred times.

Q. I will show you a pair of shoes marked for identication as Government Exhibit 12 and 12-A, Mr. Thompson, and ask you if you have ever seen these before?

A. Yes, I have.

Q. How are you able to identify them?

A. Well, partly from my initials and my recollec-

342 tion of the shoes themselves.

Q. I show you a kodak film pack, containing some negatives, marked Government Exhibit 4, and ask you if you have seen this before?

A. Yes, sir. I have also seen this before.

Q. Where did you first see these negatives, Mr. Thompson?

A. They were submitted to me in the laboratory in Washington.

Q. Where did you first see the shoes?

A. I saw those at the same time under the same conditions.

Q. Will you describe what you did after you received the negatives and the shoes in the laboratory?

A. I was requested to compare the impression which appears throughout the 11 negatives.

Mr. Green: I object to that as not being responsive, what he did.

The Court: Not what you were requested, what did you do?

By Mr. McGarr:

Q. What did you do with the negatives and the shoes?

By the Witness:

343 A. With respect to the negatives, I made photographic prints from them.

Q. Do you have those with you?

A. No, I don't have any of the actual sized prints that I made with me.

Q. With respect to the shoes, what did you do?

A. I examined the shoes and made a comparison between the prints that I made from the negatives, and the heels which appear on the shoes.

Q. Did you make any impressions of the heels?

A. Yes, to assist me in my examination I made inked impressions of the heels on paper. I used a stamp pad and pressed the heels onto the paper, after I had inked the heels.

Q. Have you made any photographic enlargements of any or some or all of this evidence which you brought with you today?

A. Yes, I have. I have made photographic enlargements of three of these negatives, and I have made a photographic enlargement of the heel of the left show, and also an enlargement of one or the inked impressions which I made.

Q. Do you have those with you?

A. Yes, I do.

344 Q. Mr. Thompson, would you put those on these racks so the Court and jury and the defendant can observe them while you are testifying concerning them?

A. Yes, sir. I will step down there.

Mr. McGarr: Yes, sir.

I would like to have these marked as Government Exhibits 18, 19 and 20 for identification.

(Whereupon said photographs were marked Government Exhibits 18, 19 and 20 for identification.)

By Mr. McGarr:

Q. Is it all right over there?

By the Witness:

A. Yes, sir.

Q. Referring, Mr. Thompson, to the triple photographs, which have been marked as Government Exhibit 18 for identification, and which you have just hung on this rack, and to what appears to be the imprint of a heel, marked for identification as 19, and what appears to be a photograph of a heel marked for identification as Government Exhibit 20.

345 I had better have this marked as 18-A.

(Whereupon the said photograph was marked Government Exhibit 18-A for identification.)

Mr. McGarr: May the record show that the triple photograph previously identified as Government Exhibt 18 has now been identified as Government Exhibit 18-A for identification.

By Mr. McGarr:

Q. (Continuing) Are those the photographic enlargements of the impressions you just testified that you made in the laboratory in Washington?

By the Witness:

A. They are the photographic enlargements.

Q. Will you explain how those are used in arriving at

a conclusion or a comparison between the picture of a heel print and the heel itself?

A. First, I will explain actually I didn't use these enlargements in my examination. I made them directly from the shoes, and from the print I made from the photograph, and the inked impressions. These enlargements are merely for demonstration purposes.

346 The exhibit on my right which is Government Exhibit 18-A—

Mr. Green: If the Court please, I think the witness should testify from material which he used rather than from some enlargements for purely demonstrative purposes. If the enlargements were in any way of assistance to this witness in making or coming to his conclusion which I presume he will express, I think it is proper. But if it is not, I don't think it is proper at this time.

Mr. McGarr: I think, your Honor, his conclusions will be based upon the heel and print as he mentioned, but in illustrating the means he arrived at the conclusion he used these for demonstration purposes, the enlargements, and I think they appropriate.

The Court: Is the object of which this is an enlargement, is that present in court?

Mr. McGarr: Yes, it is, your Honor.

Mr. Green: That is what I mean.

347 The Court: Sir?

Mr. McGarr: Yes, it is, your Honor.

The Court: What is that an enlargement of?

By Mr. McGarr:

Q. Will you answer that?

By the Witness:

A. Exhibit 18-A consists of three enlargements.

The Court: Of what?

The Witness: These three enlargements are made from three negatives which are here (indicating).

The Court: Yes?

The Witness: And the exhibit marked Government Exhibit 20 is an enlargement of the heel on the left shore.

The enlargement marked 19 is an enlargement of one of the inked impressions I made from the left heel. I have that inked impression in my possession.

The Court: I think that ought to satisfy you then. He has the objects from which he made the enlargements present in court, and he says that is an enlargement 348 of those objects.

Mr. Green: May I ask just couple of questions to clear myself up on this?

The Court: Yes.

Cross Examination by Mr. Green.

Q. You have had submitted to you a number of negatives which are marked Government Exhibit 4?

By the Witness:

A. That is correct.

Q. That was done by you?

A. The enlargements?

Q. The photographic enlargements?

A. Yes, I did it. It was under my direction and I worked with another man who did it.

Q. Now, Government Exhibit 19, if I understand you correctly, is a stamp which you prepared from the left heel of Government Exhibit 12 and 12-A?

A. Yes, sir, that is correct.

Q. And Government Exhibit 20 is actually a pho-
349 tograph of that heel?

A. Yes, sir, an enlargement.

Mr. Green: That is all.

The Court: All right, proceed.

Mr. Green: I was just not clear on it, your Honor.

The Court: All right.

Mr. McGarr: Shall I proceed, your Honor,

The Court: Yes.

Direct Examination (Continued) by Mr. McGarr.

Q. Will you continue, Mr. Thompson?

By The Witness:

A. Yes, sir.

The negatives which were submitted to me as Government Exhibit 4, the 11 negatives, I examined all of them and they are negatives showing photographs of the same print taken in different positions under different lighting. But they all show substantially the same thing. This print.

I took three of these negatives which I considered out of the 11, and those three are the ones I used in
350 making the enlargements which are described as Government Exhibit 18-A.

The request was made to me that—

Mr. Green: I object to the request, and ask that he state what was done. I think that is what it should be.

By The Witness:

A. (Continuing) —The purpose of my examination was to—

Mr. Green: I object to that, your Honor.

The Court: Just say what you did without saying what the purpose of it was.

By The Witness:

A. (Continuing) I compared the impressions which were photographed in Exhibit 4 with the heels on the shoes, both the right and the left. Exhibits 12 and 12-A. In making my examination I made inked impressions of these heels to assist me in determining the type of impressions which would be left by the heel.

I found in my examination, first, that the word "Essex" appeared throughout the negatives on Exhibit 4, as
351 you see here (indicating) in Government Exhibit 18-A, the word "Essex" with that line underneath it appears on these three enlargements (indicating).

I found that was also true of the heels on the shoes, Government Exhibit 12 and 12-A. The word "Essex" appeared on the heels. This line also appears, which is a ridge on the heel—

Mr. Green: I think it would be better to identify it. We don't know what this line is.

By The Witness:

A. (Continuing) —this ridge under the word "Essex" also appears on the heel, and shown here in Government Exhibit 20.

Also, in Government Exhibit 19 which is an inked impression of the permanent heel.

I went further then and tried to find anything in the inked impressions that I had produced from this heel, and also from the heel itself which I considered accidental in nature, any unusual marks or wear which appear on this heel, to see if those marks also appeared on the photographic negative, Government Exhibit 4.

I found, for an example, between the "E" and the
352 "X" in the word "Essex" there was a break and it did not print solidly. Here (indicating) it is shown in Government Exhibit 19 which, of course, was the inked impresion made from the heel, depicted here in Government Exhibit 20. It is a break, a cut or a bruise in this word "Essex" here, the "E" runs into the "X".

In examining the photographic negatives, I found this also was true where the "E" ran into the "X" and there was a definite break and it did not print. As shown here in Government Exhibit 18-A at the top of the photograph (indicating), and in the other two photographs underneath, Exhibit 18-A. The same thing appeared there (indicating).

In examining it further, I found in the line below the word "Essex" the ridge. That is a raised portion of the heel (indicating on shoes to the jury.)

Mr. Green: I think I will object to the demonstration.

The Court: Objection sustained.

By The Witness:

353 A. (Continuing) That is a raised portion on the heel, that prints when the ink comes in contact with whatever it touches. This (indicating) had ink on it.

I found on that raised portion there were certain markings on the heel, certain little cuts and bruises that appeared throughout my inked impression. For an example here (indicating), on the line that I speak of, under the two "S's", almost directly below where the two "S's" meet, I found a little dip in the upper part of the rounded end of the heel.

I found over further under the "E", the second "E" in "Essex" defects which I have pointed out here (indicating) in Exhibit 19 with an arrow, showing where the ridge has a defect in it and it is not printed as a solid line.

Mr. Green: I object to the characterization of the defects. All the witness is able to state is that there is ridge.

The Court: Strike out the word "defect" and let the rest of it stand.

By The Witness:

354 A. (Continuing) The print that I made from this heel showed up in this fashion throughout the prints. In examining the heel I found that there were cuts and bruises on that line which caused the differentiation in that line because of the little cuts and markings which I have described.

I found in examining the photographic negatives, the prints which I made from the photographic negatives, as shown here in Exhibit 18-A, that this was also true. Under the double "S", for an example, I found that that print showed a definite dip.

In other words, where no ink appears here in Exhibit 19, there was no marking appearing here either in the photograph or the negative.

Under the second "E" in the word "Essex", I found where I had found a definite break in that line, and it is also true in the photographic negatives.

I found in several other places along that line the same markings were consistently matched.

I found in the capital "E" in the word "Essex" on
355 the shoe, and on the inked impression, in the last loop, the stroke on that "E", I found what appeared to be a cut in the ridge. And in examining the ridge on the heel, I found that it was so, and therefore the inked line on that "E" was not solid.

In examining the impression in the photograph I found out that also to be true, the capital "E" in the last loop of that capital "E" did not show up as a solid line on the photographic chart.

I found that on both "S's" on the stroke going up from the line to the top of the "S" there were characteristics showing a break in the line.

I found that in examining the heel that there were cuts and bruises in those two areas, and they did not show up as a solid line.

This I found to be true also in examining the word "Essex", in the section where the word "Essex" appears, on the photograph negatives, Government Exhibit 4.

I found the "X" which is made more like the printed "X" seen here in Exhibit 19 (indicating) the top bar
356 line to the right, and the bottom bar line both would not print solidly. In examining that portion on the shoes I found that there were cuts and marks which had caused it to print in that fashion on the prints I made.

In examining the photographic negatives I found that that was also true. In the top portion of the "X" there was a definite dip where the line did not print solidly, and in the bottom portion of the "X" it was in the same fashion.

I have pointed out some of the markings that I found in my examination.

By Mr. McGarr:

Q. Will you take the stand again, Mr. Thompson?

A. Yes, sir.

Q. As a result of your examination, Mr. Thompson, of the films submitted to you and identified as Government Exhibit 4, and the shoes which are marked Government Exhibit 12 and 12-A, have you reached a conclusion as to the identity or lack of identity in the heel prints show in those films, and the heels of these shoes?

A. Yes, I have.

Q. What is your conclusion?

Mr. Green: I would not object to it being limited
357 to the one shoe he testified comparing.

Mr. McGarr: It was the left shoe that Mr. Thompson testified he compared.

The Court: With that limitation, you have no objection?

Mr. Green: There is no objection then.

The Court: (Addressing the witness) You may answer the question.

By The Witness:

A. It was my opinion that the heel print impression appearing in the photographic negatives, Government Exhibit 4, was made by the heel on the left shoe, Government Exhibit 12 or 12-A whichever it was.

Mr. McGarr: No further questions.

Cross Examination by Mr. Green.

Q. I have a very few questions, Mr. Thompson.

Your opinion is based upon the factors you have described to us, and to the Court and jury on the examination of the exhibits which are on the board, is that correct?

By The Witness:

358 A. That is correct.

Q. I think you stated when you were qualified that

you were an examiner of shoe prints, tire prints, typewriter writings, and the like?

A. I said typewriter, yes, sir.

Q. Now, as an expert on these shoe prints, are you acquainted with the "Essex" heel?

A. Yes.

Q. It is quite a common heel, is it not?

A. Well, I don't know. That is a little hard question to answer. The Essex Rubber Company is a rather large rubber company, and I would assume that they make—

Q. A great many?

A. That is correct.

Q. Heels?

A. That is right.

Q. These are what are known as molded heels, aren't they?

A. Yes, and in this case, that is true.

Q. This (indicating) is a molded heel?

A. Yes.

Q. Will you explain to the jury what is meant by a molded heel?

359 A. A molded heel is a heel made from usually a cast iron or a steel mold where rubber is placed into the mold, and the rubber assumes the characteristics of that mold so each piece of rubber that is placed in the mold will have the same characteristics in the design. That is substantially what it is.

Q. In other words, the form conformation of the heel that comes out of the mold is identical one with the other, isn't that so?

A. Yes, in design, that is correct.

Q. In design?

A. Substantially so to a certain degree.

Q. Now, I was noticing the break which exists between the second "E" in the word "Essex", and the beginning

of the "X", and I also notice on Government Exhibit 18-A, similarly with reference to Exhibit 19, that break is characteristic of the "Essex Mold", isn't it?

A. No, as a matter of fact, it isn't. I examined an Essex heel in the laboratory and the heels which we had did not have that break in them there.

Furthermore, I examined the heel itself in this case and it is my opinion that it resulted from wear. It
360 didn't have that characteristic in the mold.

Q. By "wear" you probably mean a bruise or some striation? You didn't mean a simple wear, or the entire thing would be worn down?

A. Well, of course, a wear of any degree. Yes, a bruise of some kind, or it could have been just from walking on the sidewalk.

Q. Now, the Essex heel is a heel used by repair men, isn't it? It isn't a heel that is customarily put on new shoes, isn't that so?

A. All I can say is that generally speaking, a heel of that type is used for repair work.

Q. Do you know of any of the new shoe manufacturers who use the Essex heel?

A. I am not—I wouldn't know. I don't have an occasion to know, but I can just say—

Q. (Interposing) How many classes of heels are manufactured by Essex, do you know?

A. Designs?

Q. Different designs?

A. Oh, several hundred different designs.

Q. Are you sure there are not only two?

A. No, I am positive.

361 Q. You are positive there is more than that?

A. Yes, sir.

Q. Now, I am not speaking of sizes, I am speaking of designs?

A. What you may have in mind are heels with the word "Essex" on them. They make relatively few of those, but they make several hundred different designs of heels. I am familiar with a lot of the rubber heels that they do make.

Q. Would it be correct that there would be only two designs with the word "Essex" as manufactured by them?

A. I think that is incorrect, based upon my recollection, but I wouldn't want to say positively. But it is my recollection that there are many different "Essex" heels with the word "Essex" on them.

Q. Now, as you know from your experience, Government Exhibit 18-A were photographs of an impression that was made after the fingerprint powder was placed on the object, is that right?

A. No, that is not correct. No fingerprint powder was placed on it.

Q. How was that prepared for that photograph, 362 if you know?

A. I spoke to the man who made it.

Q. I wish you would tell us.

A. There was no preparation.

Q. It was taken directly?

A. Yes, sir.

Q. Directly from the object?

A. Yes, sir.

Q. Very well.

I show you Government Exhibit 12-A which is the left shoe. That is the only shoe I think you testified concerning this, isn't that right?

A. Yes.

Q. And calling your attention to some of the very severe breaks and wear markings at the base of the heel, near the arch (indicating). Were those included in the photographs that were submitted to you?

A. Some of them in that area would have been included in the area photographed. For an example, this one at the top (indicating).

Q. You don't understand me, Mr. Thompson.

A. Well, this one (indicating) for an example,
363 the center—well, let us take the bottom one on the edge there (indicating), 18-A. This photograph was made in such an area that it wouldn't have included that much of the heel. It would have started in about that area (indicating).

Q. How many photographs were submitted to you in all?

A. Eleven.

Q. Why did you select these three?

A. For no particular reason. I felt they were representative of the photographs which were taken.

Q. Don't you think it would have been more representative and more demonstrative if you had the photographs which showed these very definite severe breaks and wear marks in the instep?

A. Well, as a matter of fact, that didn't show too clearly on any of them in that area. I wasn't picking out one to do it purposely, because that area didn't show clearly.

Q. Don't misunderstand me. In none of the 11 photographs that were submitted to you, did the area I have indicated, the instep where the severe breaks are here, not here (indicating)—

A. (Interposing) Well, they may have appeared,
364 but not clearly.

Now, for an example, down in that area the two marks—

Q. Indicate for the record the area near the instep.

A. Yes, sir, right here (indicating). That is right.

Now, in my examination I didn't find any that showed

clearly that portion of the heel. They did put the camera over that area but there was no clear outline of that portion of the heel.

Down in that general area there are two nail holes which appear and that is all that shows.

Q. Well, nail holes would be identical in any heel of this manufacturer, wouldn't they?

A. Yes, that is correct. That would be the position of them.

Q. Would you care to express an opinion, or do you feel yourself qualified to express an opinion, Mr. Thompson, as to the relative popularity of the Essex heel on a pair of shoes?

A. Well—

Q. I mean just in a general way as you can. If 365 you can't, you can't.

A. Well, this will be very, very general. It isn't the most popular repair heel, but it is not the most unpopular heel.

Q. But there are a lot of them around?

A. Well, I should assume so.

Q. In the millions?

A. Well, I just couldn't take a number. I have no idea.

Q. I think in your direct examination you used the word "defect" on several occasions. By "defect" you mean any irregularity, don't you, in the line or lettering that you have described?

A. Well, perhaps I could describe it more clearly than the word "defect". When I spoke of defect, it was not in the sense that it was a defect in the mold design of that rubber, but what I had in mind were characteristics that were the result of wear, and cuts, and bruises, in the heel.

Q. Now, by looking at a heel or an enlargement of an impression of a heel—and that is what you used a photo-

graph of the impression, isn't that correct?

A. In my examination, no, but I have used them here in demonstration.

366 Q. But not in your examination?

A. No, I didn't use the enlargements in that.

Q. Whatever you find on the heel could be found in the hold, isn't that correct?

A. No, not in my opinion.

Q. Upon what do you base your opinion to the contrary?

A. In the examination of the heel itself. A cut mark is generally very easy to distinguish from a mold characteristic, because the mold characteristic will have a vulcanized look that is quite easy to spot, as compared to something that is caused by wear or that has been torn.

Q. It is simple a visual observation, isn't it? Just by looking at it?

A. Yes.

Q. Now, looking at Government Exhibit 12-A which is the left shoe and which has the left heel that has been testified about, is the break between the "E" and the "X" a result of a mold depression, or is that the result of a cut, as you stated?

A. Well, I will restate what I said before, in my opinion, it is not the mold characteristic, but it is a
367 result of wear, or bruise, or cut in that area.

Q. Have you examined other Essex heels of this type to determine whether or not that characteristic is present on the mold?

A. Well, I examined the other Essex heel on the right shoe and that was different in that respect.

Q. There is a different mold for the right than there is for the left, isn't there?

A. Well, in this particular case I don't believe so because they are not made—they are made symetrically. So,

what the jobber does there is merely use the same heel on each shoe, and cuts it down with his machinery to fit the shoe.

Q. In any of the 11 photographs that were submitted to you for examination, did the distinctive wear mark of the instep appear at all, in any one of the 11?

A. To the best of my knowledge, that didn't show clearly, as I stated previously, that area didn't show clearly.

Mr. Green: That is all, Mr. Thompson. Thank you.

368 The Court: Any redirect?

Mr. McGarr: No, your Honor.

The Court: That is all, Mr. Thompson.

(Witness excused)

Mr. McGarr: Your Honor, at this time I would like to move to admit into evidence Government Exhibits for identification 12 and 12-A being the pair of shoes, 18-A and 19, and 20 being the three demonstrative charts which are hanging on the racks.

Mr. Green: The form of objection which was passed upon this morning will be repeated.

The Court: Yes. The objection is overruled. They may be admitted.

(Whereupon said shoes and charts marked Government Exhibits 12 and 12-A, 18-A, 19 and 20 were received into evidence.)

Mr. Green: And the same holds for the others?

The Court: Yes.

What about 11? Have you introduced that?

Mr. McGarr: We will have to check that and see if it has been admitted before.

The Court: All right.

369 Mr. McGarr: We will call Mrs. Peifer.

The Clerk: Will you raise your right hand and be sworn, madam?

Mrs. Peifer: Yes, sir.

(Witness duly sworn)

ELIZABETH PEIFER, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. Will you state your name, please?

By the Witness:

A. Elizabeth Peifer.

The Court: You will have to do it better than that. They all want to hear you.

The Witness: Yes, sir.

By the Witness:

A. (Continuing) Elizabeth Peifer.

The Reporter: Spell your last name, please.

The Witness: P-e-i-f-e-r.

By Mr. McGarr:

370 Q. What is your business or occupation, Mrs. Peifer?

By the Witness:

A. Bank teller.

Q. In what bank are you employed?

A. The Maywood Proviso State Bank.

Q. Were you employed at the Maywood Proviso State Bank on November 4, 1955?

A. Yes, sir.

Q. What was your job, or what is the description of your position? What was it at that time?

A. Bank teller.

Q. Bank teller?

A. Yes, sir.

Q. In the course of your duties as a bank teller, do you have any one place where you performed your duties in the bank?

A. In a cage.

Q. Is that called the teller's cage?

A. The cage.

Q. Will you speak as loud as you can? I will stand back here, and talk loud so you can hear me.

A. Yes, sir.

371 Q. Is there a designation among the employees in the bank as to different teller cages? Do they have numbers, names or something?

A. Mine would be Number 3.

Q. Yours would be teller's cage Number 3?

A. Yes, sir.

Q. Calling your attention to November 4, 1955, were you at work on that day?

A. Yes, I was.

Q. Were you working in, or in the vicinity of the teller's cage Number 3 or in it?

A. I wasn't right in the cage at the time.

Q. Well, did anything unusual happen on this particular day?

A. I would say there was. There was a robbery.

Mr. Green: I can't hear you.

The Witness: You can't hear me?

Mr. Green: No, sir.

By The Witness:

A. There was a robbery.

372 By Mr. McGarr:

Q. Will you describe, please, to his Honor, Judge Igoe, and the jury, what occurred that day that you could see and hear?

By The Witness:

A. That night, you mean?

Q. When you say night, what time was this that this robbery occurred?

A. About 6:25.

Q. What day of the week was this, if you recall?

A. Friday night.

Q. Is the bank normally open on Friday nights?

A. Every Friday night.

Q. Now, speaking as loud as you can, Mrs. Peifer, will you describe what happened?

A. Well, I was standing at the savings machine and I heard someone say, "Tricks or treat, we mean business."

With that I turned around and I could see a man leaping, just getting ready to leap from cage 1 into cage 2.

Q. Will you describe this man, please?

A. I can't very well. Only just what I saw at the time.

373 Q. What was it you saw?

A. Just his head, and it was hooded with a mask or what you call it.

Q. Will you describe the hood, if you recall?

A. Well, to me it looked like it fit over his head, and all I saw were the slits for the eyes.

Q. What happened after you first saw this man?

A. Well, I went from the savings machine into a corner. Then I happened to think that Mrs. Erickson was in cage 4.

Mr. Green: Pardon me, I can't hear you. It is my fault because I can't hear well.

By The Witness:

A. (Continuing) Then I happened to think that Mrs. Erickson was in cage 4, and I got up and looked. I thought maybe I could get her to come and stand where I was, and with that I saw one of the bandits leap from cage 4, and he turned and was getting ready to leap into my cage, cage 3.

By Mr. McGarr:

Q. Did you observe that any of those men had

weapons?

374 By The Witness:

A. No, I didn't see any.

Q. Do you know whether they did or did not?

A. No, sir.

Mr. Green: I object to that. She said she didn't see any.

The Court: She said no.

By Mr. McGarr:

Q. When the bandits leaped into cage 3, were you in the cage at the time?

Mr. Green: I object to that. The witness has not testified the bandit came into cage 3.

The Court: She said he was about to come in.

By The Witness:

A. He was about to leap into my cage.

By Mr. McGarr:

Q. Did you see him leap into cage 3?

By The Witness:

A. No, I didn't see him.

Q. Did you see any bullets in the course of these activities?

A. Yes, I did.

375 Q. Will you describe where and how you saw those?

A. Well, after it was all over I passed cage 2 and noticed that there were bullets on the counter. And as I left there and went around I saw bullets on the floor.

Q. How long, if you are able to state, were the bandits in the bank?

A. Oh, not any longer than three or four minutes.

Q. How many of them did you actually see?

A. Two.

Q. Do you know whether there were others?

A. I don't know.

Mr. Green: I object to that question.

The Court: She said she doesn't know, so that takes care of your objection.

By Mr. McGarr:

Q. Did you return to your cage after the bandits left the bank?

By The Witness:

A. Just to walk by it. We were told not to go in there.

Q. When did you next to go to your cage after
376 the bandits left?

A. I didn't go in there.

Q. Well, did you go in the next day?

A. Yes.

Q. Did you examine the cash drawer in your cage, cage 3, after the bandits left?

A. Yes, I did.

Q. What was its condition?

A. Everything was gone.

Q. Had there been any money in that cash drawer before the bandits came into the bank?

A. Yes, there had.

Q. Were there any strapped packets of money there?

A. Yes.

Q. That is, money strapped?

A. Yes.

Q. Did you have any $2 bills in your cash drawer before the bandits came into the bank?

A. Yes, I did.

Q. Will you describe what you can recall as to how may $2 bills you had?

A. I had 25 of them, $50.

Q. Were those in a single strapped packet?

377 A. That is right.

Q. Were those a part of the everyday currency which you handled in that cage?

A. That was in—

Mr. Green: I object to that, your Honor.

The Court: What is your objection?

Mr. McGarr: I think it is proper.

Mr. Green: I don't think it is proper. All that she can say is whether or not she had certain articles in that cage, not the purpose of having the articles or any other thing else, any other circumstances.

The Court: I think she may describe the circumstances. She put the money in the drawer.

Mr. McGarr (addressing the reporter): Will you read the question.

(Question read.)

By Mr. McGarr:

Q. What is the answer?

By The Witness:

A. Yes.

378 Q. What was the practice at that time at the bank at the close of banking business with relation to the cash drawer? Would it be emptied every night?

A. Not all of it, no. If I had too much, I would put it in the vault.

Q. But some money was left in the bank drawer?

A. Yes.

Q. As to this particular packet of $2 bills, how long, do you recall, it had been in the cash drawer?

A. Oh, I would say about two months.

Q. I show you, Mrs. Peifer, four $50 bills taken from a larger Exhibit 13, and ask you if you will examine those, please?

A. Yes, sir?

Q. Have you seen those—

A. Just a minute. I want to put my glasses on.

Q. Pardon me.

A. Yes, sir?

Q. Have you ever seen those four bills before, Mrs. Peifer?

A. Yes, I have.

Q. How are you able to state that?

379 A. They have my figures on them.

Q. When you say they have your figures on them, will you describe more precisely what you mean?

A. Well, toward the end of the day I would take the money, and if I had time, count it, and I would put whatever I counted on top of the top bill.

Q. Did you use bills of any particular denominations to make these markings, as a general practice?

A. As a rule with the $50 and $100 bills.

Q. Do you recognize any notations on those bills as being yours?

A. On all of them.

Q. On all four?

A. Yes.

Q. Did you ever make a notation on bills other than in the bank? In other words, on your personal money?

A. No.

Q. When, if you recall, prior to today was the last time you saw those particular bills?

A. I can't say just when. I saw them that day.

Q. When you say that day, what do you mean?

380 A. November 4th.

Q. Do you recall having those bills exhibited to you by an FBI Agent at the bank?

A. Yes.

Q. Did you keep the bills at that time or did he keep them?

A. No, he had the bills.

Q. Prior to today I presume that would be the last time you saw them, is that correct?

A. Yes, sir.

Mr. McGarr: That is all.

Cross Examination by Mr. Green.

Q. May I see those bills you have in your hand?

By the Witness:

A. Yes, sir.

(Whereupon the witness handed to Mr. Green some U. S. currency.)

Q. Now, I might not have understood you correctly. You said you saw these bills on November 4th?

A. November 4th.

Q. 1955?

A. That is right.

381 Q. Now, I hand you back these bills, Miss Peifer, and ask you to state to the court and jury how you recall that it was on that day you saw these bills.

A. What do you mean?

Q. You first, I believe—I don't want to confuse you. You first told us you recognized the numbers that you placed on the bills?

A. That is right.

Q. Then you next told us you recognized those bills as having been seen by you on November 4th. I would like to have you just tell us how you recognize those bills as having been seen by you on November 4th?

A. Well, when I balanced, that was all.

Q. You balance every day, don't you?

A. Every day.

Q. How is it you can say you saw those bills on November 4th?

A. Why wouldn't I see them on that day?

Q. I don't mean to argue with you, ma'am.

A. They were in my cage.

Q. Just tell the jury and Judge Igoe how you can recognize these bills as having been seen by you on

382 November 4th? Is there any date or anything else on those bills to help you?

A. No, just my figures.

Q. And you put figures on bills every day when you balance, don't you?

A. That is right.

Q. Now, is there anything distinctive about the figures you used on November 4, 1955?

A. No.

Q. Therefore, you can't say you saw the bills on that date, can you?

A. No, not any other than they are my figures.

Q. That is what you mean to say?

A. Yes.

Q. You only say those are your figures?

A. Yes.

Q. But for all you know you might have put these figures down any other day than November 4th, or November 3d, or November 2d, or any day at all, isn't that so?

A. Well, as a rule I put the last figure on there, on the day I balance.

Q. Well, you balance every day, don't you?

A. Yes.

383 Q. So you might have put them down there any time?

A. Why wouldn't those be the last figures I have down there, the day I balanced, if it was on top?

Q. You tell me?

A. Still, I wouldn't know if they were on top or not.

Q. You tell us how those would indicate to you that was balanced on November 4th?

A. Well, I can't say it was balanced on November 4th, other than to say those are just my figures.

Q. That is all you can say, those are your figures?

A. Yes, sir.

Q. Now, the practice of balancing by bundling up some

currency and marking the top bill is generally used by banks, isn't it?

A. Well, I imagine so because on one of those bills there are other figures on there. They may do that too. I don't know. That is just to help me.

Q. Now, I show you first that bill which is marked as G-02617652A serial number, being a $50 bill. Now, 384 the only figure I see on there in pencil is the figure 150, isn't that right?

A. Yes.

Q. Is that your writing, "150"?

A. That is mine.

Q. The 1 consists simply of a vertical line, doesn't it?

A. The 1, yes.

Q. And the 5 is made more in a conventional form, isn't it?

A. Yes.

Q. And the circle is a circle, is it not? An oblong circle?

A. Yes.

Q. What is there about that vertical line and the oblonged circle, and the number 5 that enables you to now tell us that you and no one else made that figure?

A. I just know those are my figures. I know my figures. This one on here.

Q. What is there about it to indicate that to you?

A. That is the way I write it.

Q. You have occasion to see other bills which bear 385 figures, don't you?

A. Yes, sir.

Q. And those other figures are all different from this "150", as you have written it?

A. Yes.

Q. Have you ever seen a "150" figure made that way before?

A. Well, I don't know. I never really scrutinized the figures before. Maybe there are figures like that.

Q. I now hand you a $50 bill with serial number G012-54879A. I notice that bill bears the figure 6550. That is in your handwriting too?

A. That is my handwriting.

Q. I will now ask you to compare the bill I last showed you with the previous $50 bill which has been identified, and state whether or not you believe that those were made by the same person, that is yourself? Notice the "5", please?

A. Maybe I was in a hurry when I wrote either one of these.

Q. In other words, your form of writing changes, depending on the speed with which you want to write and the stress under which you write, is that so?

386 A. It could be.

Q. Does the "5" on the exhibit last showed you in any way resemble the "5" on the other exhibit?

A. A little, yes.

Q. I next show you this bill bearing the serial number J018026291A and the figure "700". Is that in your handwriting?

A. No, that is not mine there (indicating).

Q. What portion of that writing is?

A. Here (indicating).

Q. The 4600?

A. The 4600.

Q. And in the last of these bills, this one No. D03091-066A, the R4A,500 is also in your writing?

A. That is right.

Q. But you are able to positively state that is in your handwriting because of the way the figures are made, is that so?

A. Yes.

Q. Looking at this "4600" will you state any other way "4600" can be written than the way it is written there? I mean, any other slant which might be employed or anything else?

387 A. Not unless I was in a hurry and I just scribbled it down.

Mr. Green: That is all.

The Court: Any redirect?

Mr. McGarr: None at all, your Honor.

The Court: That is all, madam.

(Witness excused.)

The Court: Call your next witness.

Mr. McGarr: At this time, your Honor, I would like to move for the admission of Government's Exhibit 13, being the four $50 bills concerning which this witness just testified, and the serial numbers which have just been read into the record by counsel. I don't think I have to read them.

Mr. Green: There will be an objection to that, your Honor.

The Court: We won't pass on that right now.

Mr. Green: We will not?

The Court: No.

Mr. McGarr: We will call Miss Munger.

The Clerk: Will you raise your right hand and be

388 sworn.

(Witness duly sworn.)

MABEL A. MUNGER, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. State your name, please.

By the Witness:

A. Mabel A. Munger.

The Reporter: Will you spell your last name, please?

The Witness: Yes, sir. M-u-n-g-e-r.

By Mr. McGarr:

Q. Will you speak up just as loud as you can, Miss Munger?

By the Witness:

A. Yes, sir.

Q. What is your business or occupation?

A. I am a teller at the Maywood-Proviso State Bank.

389 Q. Were you a teller on February 4, 1955?

A. Yes, sir.

Q. Were you assigned to or employed in any particular teller's cage on that day?

A. Yes, sir. I am the head teller in the second cage.

Q. That is referred to as cage No. 2, is that so?

A. That is right.

Q. Where is that in relation to cage No. 3?

A. Right beside it.

Q. Calling your attention to November 4th, 1955, a Friday, were you at work in the bank on that day?

A. Yes, sir.

Q. What are the bank's hours on Friday?

A. On Friday we open at 8:00 a.m., close at 2:00, reopen at 5:00 until 8:00 p.m.

Q. Calling your attention to the second period, 5:00 to 8:00, on that day was there anything unusual occurred at that time?

A. Yes, sir. We had a bank robbery.

Q. Were you present when this happened?

A. Yes, sir.

390 Q. Will you describe where you were and what it was that you saw and heard?

A. Yes, sir.

I was waiting on a customer who was standing at my

window and he had a check from which he was making a deposit.

I turned around and took one step out of my cage to the adding machine. My back was to the teller's window, when I heard someone call out "Trick or treat."

I did not immediately turn around. I finished my work at the adding machine, which took me about two seconds, and when I turned around and put the check back into my cage, in my money drawer, I was confronted by a man in a crouched position with a black mask covering his head and face, facing me and pointing a gun. I thought it was Hallow'en joke. But he said to me—

Mr. Green: I am going to ask that this go out.

The Court: That motion is allowed.

By Mr. McGarr:

Q. Go ahead?

391 By the Witness:

A. He said to me, "Get out of my way, lady. We mean business. We have a machine gun."

I stood looking at him and started backing away. I heard a noise in back of me. I looked down and saw the assistant cashier already on the floor. Nothing more was said. I backed out of my cage and got down behind the partition.

Q. When you got down behind the partition, before you got down behind the partition, did you observe this man, this particular man with a gun any further? Did you observe him doing anything, or see any other men doing anything?

A. No, I didn't. Just the man in the crouched position on the counter with a gun pointed at me.

Q. Where was he on the counter with relation to the cages?

A. That was cage 1's counter.

Q. Did you see him move at all?

A. Yes, sir. I saw him jump to the floor of cage 1. Then I backed away and I saw nothing more.

Q. You saw nothing after that?

392 A. No.

Q. Did you return to your cage after the termination of the bank robbery?

A. Yes, sir.

Q. What did you observe after you returned to your cage?

A. Both the drawers with money were wide open, nothing left in them, and I saw five bullets on my counter.

Q. Would you describe, please, the gun that this man held? Tell us what you remember of that?

A. Well, it had a barrel I would say about four or five inches long. That is all I remember.

Q. You testified this man said, "We have a machine gun."

Was the machine gun what he was carrying?

A. No, sir.

Q. You said that the cash drawer was empty, is that correct?

A. Yes, sir.

Q. Were there any $2 bills in that drawer?

A. Yes.

Q. How many, if you know?

393 A. There was a package of 25—

Mr. Green: I object to that.

Mr. McGarr: Pardon me. I will rephrase the question.

By Mr. McGarr:

Q. Prior to the robbers entering the bank, were there any $2 bills in the cash drawer?

By the Witness:

A. Yes, sir.

Q. On the same day?

A. Yes, sir.

Q. Will you describe them, please?

A. There were 25 $2 bills with a money strap around them.

Q. Had you placed those in the cash drawer?

A. They were kept in the second cash drawer at all times.

Q. Do you know the name of the customer who was standing at your cage when the robbers entered the bank?

A. Yes, sir, it was Mr. Lucas.

Mr. McGarr: No further questions.

The Court: Cross examine.

Mr. Green: No cross examination.

394 No cross examination, your Honor.

The Court: That is all, madam.

The Witness: Thank you.

(Witness excused.)

Mr. McGarr: We will call Mr. Lucas.

The Court: Will you be sworn, please.

Mr. Lucas: Yes, sir.

TERRY BERNARD LUCAS, called as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. State your name, please?

By the Witness:

A. Terry Bernard Lucas.

Q. Your business or occupation, Mr. Lucas?

A. Carpenter.

Q. Do you do business with any particular bank?

A. Yes, sir, the Maywood-Proviso State Bank.

Q. Will you speak loudly so everybody can hear you?

A. Yes.

395 The Maywood-Proviso State Bank.

Q. Calling your attention to November 4, 1955, were you in the bank on that day?

A. Yes, sir.

Q. Do you recall at about what time of the day you visited the bank?

A. About 6:15 or 6:20, something like that.

Q. Was there any unusual occurrence when you were present there?

A. It was held up.

Q. Will you describe, please, what happened? Indicate anything you heard or anything you saw?

A. The hold-up?

The Court: Yes?

By the Witness:

A. (Continuing) I was standing waiting to get my check cashed when I heard the doors bang open, and a man came running in and said, "Tricks or treat. This is no joke."

So he put a gun—well, he pointed it more or less at me, and went over the cage, over the counter into the cage.

I didn't see anything in the other cage. So, I reached over and tapped another patron on the shoulder and
396 told him there was a hold-up. He hadn't noticed it yet, what was going on.

By that time he was in the cage where I was dealing. Then he put a tray of money in front of me and told me to move over, and he dropped some bullets on the counter.

At that time I turned around and I saw another fellow standing by the door with one man on the floor and one woman up against the wall with a submachine gun.

Q. As to the first man, will you describe the first man that you saw; tell us what he looked like?

A. He had a hood over his head.

Q. And the second man with the machine gun?

A. He had a hood also.

Q. He had a hood also?

A. Yes.

Q. Did you see any other people, other than customers or employes in the bank?

A. Just those two.

Q. Just those two?

A. Yes, sir.

397 Q. Both of those men had guns, is that right?

A. Yes, sir.

Q. After you saw the man in the cage at which you were doing business, did you see him again? Or what happened after that?

A. After that, at that time I looked around at this fellow by the door and he told me to turn back around. So, I turned back around, just about at that time, why, this fellow that had been in the cage—

Mr. Green: I can't hear you. I am sorry. There is a lot of noise outside.

The Witness: Oh.

By the Witness:

A. (Continuing) When I turned to look at the man by the door was when this other gentleman had run out from behind the cage. So, he was not in the cage that I was dealing with.

Then the next thing, why, he came around behind me and picked up a tray of money and left.

By Mr. McGarr:

Q. Did you see the men leave the bank?

398 A. The one I did. The one who took the tray of money.

Q. Did you see the man with the machine gun again?

A. No.

Q. Did you see any other masked bandits in the bank?

A. No.

Q. Do you know whether there were any other masked bandits there?

A. Not to my knowledge, no.

Q. In other words, you don't know whether there was or not?

A. No, sir.

Mr. McGarr: That is all.

Mr. Green: No cross examination of Mr. Lucas.

The Court: The witness is excused.

(Witness excused.)

Mr. McGarr: Your Honor, I would like to again renew my motion for the admission of the four $50 bills, Government's Exhibit 13. That is, I move for the admission of Government's Exhibit 13, the $50 bills, and Gov-
399 ernment's Exhibit 16, which is the fingerprint card that was testified to by Agent Gillem, taken of the fingerprints of the defendant.

That will be all, your Honor, Government's Exhibits 13 and 16.

For the purpose of clarifying the record, I believe everything else the Government has offered has been admitted with the two exceptions, and I move again for the admission of Government's Exhibits 1, 2, 3 and 4—I understand those have been admitted.

Mr. Green: What about No. 3?

Mr. McGarr: We will withdraw that. Then it is 1, 2 and 4.

The Court: Do you have any more evidence today?

Mr. McGarr: I have another witness in the morning.

The Court: The jury may be excused until tomorrow morning at ten o'clock.

(Whereupon the following took place outside the presence and hearing of the jury:)

400 Mr. Green: You have 1, 2, 3 and 4?

Mr. McGarr: 3 is out.

We have 1, 2, 4, 5, 6, 7, 8, 9. The $2 bills are over here.

No. 10 is the bag of candy which we will withdraw.

11, the Sears Roebuck auto department form has been admitted.

12 and 12-A are the shoes.

13 are the four $50 bills.

14-A we skipped because of the stipulation. 14-A is in place of 14. 14-A, -B and -C.

The $10 bill which was found in his pocket, I understand your Honor ruled against the admission of that. That is Government's Exhibit 15.

16 we would like to move for the admission. That is the fingerprint card.

17 and 17-A have been admitted. Those are the pictures of the fingerprints on the $2 bills which were used by the expert witness Caton.

And Government's Exhibit 18 is the bown paper 401 bag. We will withdraw that at this time. It is insignificant, as I understood from your Honor's remark. It might not be admissible.

18-A, 19 and 20 have been admitted.

So, the only two which have not been admitted, and which the Government urges their admission now are the four $50 bills and the fingerprint card.

The Court: The fingerprint card is 16?

Mr. McGarr: Yes, it is, your Honor.

The Court: That may be admitted.

Mr. Green: Oh, no, your Honor. There is a very short objection to that.

The Court: An objection?

Mr. Green: That is the FBI fingerprint card on which there are a number of aliases that are listed on that card.

Isn't that correct?

Mr. McGarr: Yes, sir, there are some on there.

I have no objection if the court feels they are prejudicial to block them out. As I recall the testimony it was
402 that the information on this card was obtained from the defendant and from no other source.

Mr. Green: That must be right, as I recall it, your Honor.

The Court: You had better block them out.

Mr. McGarr: All right, we will agree to blocking them out.

Mr. Green: I object very strenuously to the reverse of the card which says "Criminal specialty, bank robbery."

Mr. McGarr. That could be blocked out too, your Honor.

The Court: I think that is slightly objectionable.

(Laughter.)

Mr. McGarr: Then we have the four $50 bills.

The Court: Let me see those bills.

Mr. Green: Yes, sir. Here they are, your Honor.

(Whereupon Mr. Green handed some U. S. currency to the court.)

Mr. Green: As your Honor observed them, there is one of the bills on which there is the figure "150", I believe, and the other one bears some number in which "5"
403 is repeated twice. Those were the two bills that were called to the attention of the witness when she testified as to the similarity of her writing.

The Court: This writing was supposed to have been made by this lady according to her testimony.

Mr. McGarr: Yes, your Honor. Not all of it. She identified certain figures and said the others were not her writing.

The Court: She testified that at the close of business she did make these notations to indicate the total amount of money in the pack.

Mr. McGarr: That is correct.

Mr. Green: That is right.

She also testified it was done by her every day.

The Court: Would that mean there were four different packs there on this night in question?

Mr. McGarr: It would merely mean those four bills were there, your Honor, not on this night in question. The witness could not say that and we did not expect her to say it. But on this particular night those bills were 404 in the pack.

The Court: I thought she did say that?

Mr. McGarr: She said that, but I think it was demonstrated on cross examination that while she believed it she could n't be sure. I did not ask her that though.

The Court: Whether it was that night or not—

Mr. McGarr: They are from the bank and they were found in the possession of the defendant Guido. Her testimony establishes that they passed through her hands in the bank.

The Court: The only reason she knows they passed through her hands was because she made these pencil notations on the bills?

Mr. McGarr: That is correct.

The Court: That would mean there were four different packs of bills?

Mr. McGarr: I don't think it would necessarily mean that. Her testimony was that there was a preliminary counting of money before closing, and when she reached a total she would mark the top bill and set that pile aside, not necessarily a pack. Merely an isolated stack of currency, to speed up the counting after the bank 405 closed.

The Court: Well, it is a rather sizable package of currency. Here is $4600. This looks like $27,500. Here is 6,550, and then $150.

Mr. McGarr: That is correct.

Mr. Green: That was more than the total amount taken from the bank on one package.

The Court: I know, but her testimony was so unsatisfactory that I don't think I would be justified in letting the jury say whether or not they believe it.

Mr. McGarr: I think, your Honor, a person can identify his own handwriting, and I think the cross examination was to the effect, the question was, "How do you know that this is your handwriting; what is the difference between this 5 and any other 5?"

It really doesn't demonstrate anything. We all make 5's alike. Yet you could recognize your numbers and I could recognize mine. She said those were in her handwriting.

Now, perhaps the manner of her testimony would
406 affect the credibility, but she does definitely say that those bills were in her cage in the bank at a particular time. So, I think it has a very great evidentiary weight that those bills were known to be in the Maywood Bank at any time, were later found in the possession of the man who is here charged with the robbery of that bank. She was not asked to explain too much in detail as to the totals or the method of arriving at them, or whether in making those markings she deposited some money in the vault before the bank was robbed when it closed earlier. I don't think the amounts are at all significant.

But she did say she recognized those markings on the bills as markings she made, and she made such markings only in counting the money at the bank. Therefore, her testimony establishes that those four $50 bills at one time or another were in the Maywood Bank.

Now, the fact that the four of them and not one was found in the possession of the defendant, I think, would lead us to an inference that he got them from the bank

on the occasion of the circumstances described by the
407 other witnesses.

The Court: Would that lead you to believe she had four stacks of $50 bills?

Mr. McGarr: No, it would lead me to believe that in the process of counting money of whatever denominations, she made a practice when she finished the pile of giving it some even number when interrupted by a customer to know her total on that pile. I don't think it is at all significant what the totals indicate. It is significant only that she put those four bills in the bank, and we later find them in the possession of the defendant. It is not a conclusive, forcible piece of evidence, but it is an accumulative piece of evidence which I think the jury is entitled to consider.

The Court: I don't know. Her testimony to me was very unsatisfactory.

Mr. McGarr: The woman was timid and perhaps it was unsatisfactory. But I think your Honor's judgment of it is a judgment predicated more on the credibility than the admissibility. I don't think the woman was lying, al-
408 though she may be mistaken in her belief, but I do believe that is a matter of credibility which the jury should be allowed to pass on.

You will recall the testimony was that an Agent took the money from the vault out of the bank and exhibited it to the employes and she said she saw it there, in fact, and did pick out these bills from a large number as those she had seen before.

The Court: I don't remember she said that. I remember she said she had seen them once before on the occasion of the Agent being there. But I don't remember her saying she picked these out.

Mr. McGarr: No, I am sorry. But the Agent did testify that he brought them to the bank and exhibited them to the employes.

I think it is significant that she differentiated some of the bills themselves between the pencil notations that are hers and the pencil notations which are not, indicating her sincerity in an attempt to be objective in the matter.

The Court: What do you have to say about it?

Mr. Green: On her direct examination, your Honor,
409 the witness stated, on oath, that she placed—these are the numbers that she placed on there on November 4th.

The court will recall that.

Upon cross examination it conclusively developed that she couldn't say whether or not she placed these numbers on there on November 4, 1955, or any other day except that she did adhere to the statement that these were her figures.

Now, we have a great stack of currency. We had $3150 in currency, which was exhibited to her. From the entire $3150, and it developed upon examination of one of the Agents this morning, that a great portion of that currency did bear pencil notations. This witness now picks out four $50 bills which she says bear pencil notations which are her pencil notations. When, she doesn't know. Merely the fact that five of the $200 out of $3150 sometime or another went through the Maywood-Proviso State Bank is certainly no evidence which should be admitted here.

I wouldn't be surprised on the bills which are cur-
410 rently in circulation here in Chicago fifty percent of them at some time or another go through one bank.

That is all of the testimony of Mrs. Peifer, and considered most favorably it amounts to that at some time or another $200 out of $3150 went through that bank. That is all it amounts to, nothing else.

The next thing I ask your Honor to consider is the inherent unbelievable part of Mrs. Peifer. I think Mrs. Peifer was overanxious. I don't attribute to her any other

motive whatsoever. She stated very definitely that these numbers were put on these packs of bills when she totaled the money which was in her tray. That was her testimony, as I recall it. It was on the top bill. She said it was usually on a $50 bill. I am quite clear about that. And the inference is that this money is the money that was taken at the time of the robbery.

Now, if that was so, just from the money which we have before us, the amount taken in the robbery would approximate $40,000 rather than $21,000, all of which
411 would seem to be evidence not that these $50 bills were money that was taken in the robbery, but it is money that couldn't have been taken in the robbery. It couldn't have been because the total amount that was taken in the robbery was $21,000, whereas if this witness is to be believed there would have had to be $40,000 taken.

That is entirely apart from something which appears to me to be most striking. Mrs. Peifer can state under oath that she is able to recognize this writing as being her writing, and being identical, but patently and obviously from the appearance of the writing it is not identical. In two cases, maybe, but in most cases they are simply just plain, ordinary numbers. I think it is a matter of almost judicial notice that a circle or a straight line bears no such peculiar and characteristic indicia which would allow anybody to say, "That is my straight line. That is my circle." And when coupled with the balance of her testimony which would show the aggregate amount of the robbery was in excess of almost $40,000.

The Court: How do you figure that?

412 Mr. Green: $6,550 would be the amount taken in this one pack. Another $150 which would be taken in the second pack, according to Mrs. Peifer, making an aggregate of $6700.

$4,600, which would be taken in the next pack. She said

the $700 was not hers but the $4600 was. So, that brings us up to over $11,000.

And $27,500 would be taken in the last pack.

That would be pretty close to $40,000, your Honor.

Mr. McGarr: There is no testimony that these bills represent separate packets. It was merely testimony that she was in the process of counting of the money when she was not busy. That she made marks to indicate the progress of her counting.

The Court: You mean, if she started with $150, she would count up to—she would count three $50 bills?

Mr. McGarr: No, she said she marked the $50 bills. It is not necessary that is all she was counting. She
413 might have counted one hundred 1's and put a fifty on there and marked it 150.

She said it was her practice to affix these numbers to these bills of a particular denomination and identify them as $50 bills.

Mr. Green: It is my recollection, your Honor, and I don't know if this tallies wth Mr. McGarr's, but the witness definitely stated that this was done by her at the end of the day when she balanced, and she put a $50 or a $100 bill on top of the pack.

Mr. McGarr: I don't recall her saying that. I recall her saying it was done toward the end of the day when she was not busy or had no customers; in preparation for the balancing at the end of the day.

But the point I am making is that she also testified that this bank closed at four or five o'clock in the day and opened later. It is conceivable that she totaled her money and brought it to the vault and in the process of counting it she would put a figure on one of these bills which she may not have taken to the vault, indicating a higher
414 total which was not a part of the robbery.

I merely submit, your Honor, that all of the objec-

tions that have been made to the admission of these particular bills relate to the credibility of the witness. And as I said before, I think that is a matter not to be considered on the exclusion of the evidence, but a matter to be considered by the jury. I think they should be admitted for whatever weight they have.

It is true that perhaps half of these $50 bills in circulation at one time or another pass through the Maywood Bank, but it is extremely rare that any person not a customer of that bank, or not known to be, has got four of them in his possession at the same time. That circumstance, I think, is entitled to consideration as to the relevant evidence pertaining to whether Guido robbed that bank.

Mr. Green: Although both of us are speaking now out of a great deal of ignorance on the subject, I would like to differ with the speculation of Mr. McGarr.

When a person has $3150 it is very unlikely that 415 $200 of that at one time was ever in, or at any time, was ever in any bank at Chicago. I feel, and it would be my own speculation, and it is only a speculation, that if a person would have $3150 there would be a great deal more than $200, the chances are which were in any bank in the city of Chicago. I think that is getting entirely away from the basic fact that there has been no showing whatsoever that these bills were the proceeds of that robbery, because there is no showing that they were in that bank, not only at but any time near the time of the alleged offense. There is no showing about that at all. She testified to that on direct, and on cross examination she withdrew it.

She said, "All I can tell you, in effect, is that at sometime or another I placed those numbers there. When, I do not know."

There is an absolute failure to connect these items with the property that was taken from that bank.

The best we have, were we to regard her testimony
416 as being gospel is that at some time or another these bills went through that bank, at some time or another. We know not when. Before or after the robbery.

Again, most strikingly is the inherent unbelievability of her testimony in that the robbery would have had to aggregate, and I don't think I am mistaken on the evidence on this because my recollection on it is quite clear, they would have had to aggregate about $40,000 if her testimony was to be accepted as true.

Mr. McGarr engages in the speculation that possibly the money was taken out of the vault. There is no evidence to that effect. I think the entire evidence was there were two trays from which the money was taken. Yes, that is the evidence, and those trays aggregated $21,000.

The Court: I don't know. I consider her testimony so incredible that I will sustain your objection.

Mr. McGarr: I think then, your Honor, the Goverment will rest at this time.

Whereupon The Government Rested Its Case In Chief

The Court: Then you will be ready to start?

417 Mr. Green: Yes, sir.

I would like to be heard on the motion, your Honor.

The Court: Let us be heard right now then. We can hear you on your motion.

Mr. Green: If the Court please, comes now the defendant at the close of the case on behalf of the United States and respectfully moves for a judgment of acquittal.

In making this motion I fully well realize that all of the evidence which has been received has to be given the utmost liberality in construction on behalf of the Government, with all doubts having to be resolved in favor of the Government, and if there is any competent evidence as

to warrant conviction in this case for it to go to the jury that this case should be allowed to go to the jury.

Now, I can sum up the evidence in this case very quickly. The entire evidence in this case, and this is all of it, is that Guido two and one-half months—two and one-half months lacking two days, about eighty-three days after the robbery, had in his possession five $2 bills
418 which were the proceeds of the robbery. No. 1.

No. 2, that there was in Guido's closet a shoe having a left heel print which was identical with a heel print which was found on cage No. 3 of the robbed bank after the robbery.

That is the sum total. Nothing more, and nothing less than that.

I very readily agree that the possession of stolen goods, including money recently after the time of a theft, standing by itself may if that possession is exclusive and is recent be sufficient to support a judgment of conviction.

However, the question of what is recent is the question we have to face.

Now, here we have a case of possession over eighty days after the commission of the offense. And the possession of what? The possession of the most mobile, most current of all property, property which is denominated as being currency because of the ease with which it is transferred and passed from person to person. I respect-
419 fully submit that the possession of any goods, even goods which are most difficult of transporting, similarly found some time from the theft is not sufficienty recent of possession so as to support a judgment of conviction.

In the case of United States *v.* Van Gorder, 21 F. 2d, beginning at p. 953.

Here we have a case of evidence of a postal robbery were there were two keys that were found in the possession of the accused eighty-three days after the robbery.

Now, they were keys which, as I understand it, to a letter drop. They were keys that were peculiar. They were keys which would have no value to anyone save someone in the post office, or someone who would be engaged in the robbery of the box, the post office box which the defendant was convicted of having robbed below. It was the use of the keys taken in the robbery for which he was on trial.

Now, certainly keys of that kind are not current. They are much less current than currency. However, in
420 reversing the conviction in that case the court said:

"Counsel for the government argue that the fact that on April 15, 1924, when the defendant was arrested, 87 days—"

I thought it was 83.

"—87 days after the keys were missed at Poplar Bluff, they were found among the effects of the defendant, raised the legal presumption that he stole them on January 17, 1924. Conceding that facts and circumstances may exist in a case from which such a presumption may arise from the recent possession by a defendant of stolen property that he had guilty knowledge that the property was stolen, and hence that he was the thief, nevertheless, in such a case the presumption that the defendant was the thief rests on the presumption that he had guilty knowledge that the property was stolen. In the case in hand the only evidence against the defendant was his possession of
421 the missing keys and the mere possession of stolen property is insufficient to sustain a finding that the possessor had guilty knowledge that it was stolen, much less, the subsequent presumption that he was the thief.

Citing cases.

I might say that a presumption, or drawing an assumption upon a presumption has been repeated since then in the case of Bollingbard v. United States in the Supreme Court.

"Moreover, the possession of stolen goods alone raises no presumption of guilty knowledge or of stealing by the possessor, unless it was recent, so recent that ample time and opportunity may not have been given to transfer the stolen property from the thief to another between the date of the theft and that of the arrest or seizure."

Citing cases.

"Eighty-seven days after the alleged theft was not so recent a possession under the facts and circumstances of this case as to sustain a finding of either guilty
422 knowledge of the defendant that the keys were stolen property or of the fact that he was the thief.

"Not only this, but the legal presumption was that the defendant was not guilty of the alleged theft, or of knowledge that the keys were stolen, and the burden was on the government to prove his guilt beyond a reasonable doubt. There was no evidence against the defendant, except the single fact that the stolen keys were found in his possession at Postville, Iowa, 87 days after they were missing."

I don't think that case has ever been disturbed. In fact, I think the rule as enunciated therein has been repeated throughout, save in some automobile cases where the court went so far as to say, and the farthest case I was able to find was where one was in the possession of an automobile, or other peculiar circumstances articles having been stolen as long as six and one-half months after the theft of that automobile was sufficient to give rise
423 to an inference which allowed it to go to the jury.

We have here, however, property which is peculiar in the ability to transfer it. We have here money, which is easy to transfer.

There is the case of People v. Kubulis, 296 Ill. 523.

Here there were twenty bolts of silk, five pieces of serge, some woolens stolen on May 18th and a part of the shipment of these peculiar goods were found in the possession of the defendants, who happened also to be the employee of the railroad from which they were stolen, twenty-four or twenty-five days after the burglary of the car.

The Supreme Court in that case said:

> "No, there is not sufficient to warrant a judgment of conviction and the case should not have been allowed to go to the jury."

The language used being:

> "It has been held in several cases that it is proper to instruct the jury that recent possession of stolen
424 goods is evidence that the possessor is guilty of the larceny and also that it is sufficient to convict, but we know of no case where the latter instruction has been given where the possession was three or four weeks after the commission of the crime."

In the case at bar we have two and one-half months. Thereafter we have some analysis of some of the cases.

In Williams *v.* People,

> "The defendant was shown in each case to have been in possession of stolen property from one to six days after the larceny.
>
> "Possession must be so recent as to indicate the possessor must have taken the property, and where it is so remote in time as to have given fair opportunity to proceed to dispose of the goods, and the defendant to acquire them honestly the possession is slight if

any evidence of guilt and it is a question of fact and
425 consideration for the jury, and not to be determined as a question of law by an instruction that the evidence is sufficient to convict. Evidence of this nature is by no means conclusive, and it is stronger or weaker as the possession is more or less recent for the obvious reason that the difficulty of accounting for possession is increased by the length of time which elapsed when the goods may have passed through hands. The rule is that recent possession raises a reasonable presumption against the prisoner."

That is quoted.

"Possession of stolen property three months after it has been lost has been held not so recent possession as to put a prisoner on showing how he came by it. In the case of possession twenty days after the theft the evidence was, however, left to the jury."

The case continues with an analysis of other cases, but in no case have I been able to find in the State of
426 Illinois, and only in some Dyer Act cases in Federal Court where possession of stolen property two and one-half months after the date of the theft was held to be sufficient to support a judgment of conviction.

And again, I invite the court's attention to the fact of the character of the property which was possessed.

The only other point we have before us is the question as to whether the case should be allowed to go to the jury on the testimony of the expert in which he expressed his opinion as to the identity of the shoe that was found in the closet of the apartment in which the accused was arrested, and the heel print which was found at the bank.

In the event this court feels that the possession here is not sufficiently recent so as to constitute evidence that then is all that remains of this case.

We have another case—

Just a moment, your Honor, and I will find it.

427 I want to find a case that is exactly on all fours with the case at bar. On the case at bar there is only a showing at the present time that the shoe was in the apartment which was occupied by the defendant.

As to when the heel print had been placed on the bank counter, there is an utter failure of proof as to time. In fact, and I listened quite carefully for this because I recall the Agent testified as to a photograph which was taken as being taken off of counter 3, and there was no evidence that at any time anybody was ever on counter 3.

In the case of Giaconi *v.* State a case reported in 62 S.W. 2d, at page 986, the Court of Criminal Appeals of Texas, 1933. The case was where they had photographs of a print on a window sill of the burglarized place, and on the heel of a shoe where they were made by the expert and identified upon trial, and the photographs were enlarged, and they found 21 points of similarity of identity between the two prints. The testimony as to the identity was quite conclusive.

428 In reversing the conviction the court said:

"The unexplained failure of the state to introduce testimony showing that the heel print upon the window—"

Which was used for the purpose of comparison, and here we have a heel print upon the counter.

"—was not upon the window sill before the date of the alleged offense is a matter from which no inference unfavorable to the appellant could be drawn, and upon which no presumption adverse to him could be found. Upon the subject the following quotation is taken from the case of Davis *v.* State, in which there are a number of decisions supporting the test. No reason was given for the failure for the

witnesses and persons who had access to the Findley's granary to show the granary was not accessible to others. The Findley case likewise. In the absence of testimony a description of the facts cannot in the
429 state of the evidence create any inference against the appellant. Raising no question as to the admissibility of the testimony of the expert touching the comparison of the photograph of the heel print on the window sill, and the heel of the shoe which was found on the foot of the appellant—"

Here it was not on his foot but merely in a closet in an apartment in which he was arrested.

"—we are impressed with the opinion that the testimony of the expert alone would not suffice to comply with the legal requirements touching the conviction of one accused of a crime on circumstantial evidence alone.

We can find no closer case than the case of Giaconi *v.* State, from which I have just read. We feel very strongly that the possession here is so remote, even where the possessed commodity and, not currency, so that no inference should be drawn or a presumption exercised against the defendant. The case, therefore, rests solely upon the testimony of the expert.

Thank you.

430 Mr. McGarr: In dealing with a masked robbery circumstantial evidence is not possible, and it certainly is not necessary to leap to the conclusion that it is impossible to obtain a conviction in such a case.

Nor is it tenable to isolate the Government's evidence into two airtight compartments and to say that the possession and the spending of the $2 bills by Guido some sixty days or more after the bank robbery must be con-

sidered alone, and then recite a series of cases indicating that subsequent possession is not alone a basis for conviction. Then ignoring that completely and move to the heel print and the testimony of the expert, and say that the heel print alone is not a basis for conviction because it is precisely the combination and inter-action of those two which makes the Government's case the kind of a case which we feel we are entitled to go to the jury on.

The evidence is, briefly, again, and it can be stated briefly that on November 4, 1955, a bank was robbed of about $21,900. The evidence is that Guido was in that 431 bank, as evidenced by the fact that a heel print from a shoe found in the closet of his apartment was on the counter in that bank. It was on counter 3, the counter in which the testimony was that the cash drawer was emptied by a man leaping from counter 4 to counter 3.

On January 14th the evidence is that Guido opened a safety deposit box and $3150 was found therein a few days later. That would indicate that Guido was handling a large sum of money on that day.

On January 14th, the identical day, the evidence is, that Guido was in various departments of the Sears Roebuck store and spent five different $2 bills, which without any question were bills stolen from the bank at the time of the robbery.

You can read many cases, both State and Federal, where possession sixty days or more after a robbery of stolen property is not enough to convict. But I heard no case cited by counsel where the same possession was coupled by positive evidence that the defendant was at the scene of the crime. It is only when possession alone is 432 relied on. And this defendant was not only in the bank but, as a matter of fact, was standing somewhere in the vicinity of cage 3 on the counter in the bank, which is significant.

If possession of property after the crime was the only evidence available to the Government, we would not be in court. We are here, however, because that possession, coupled with the evidence is that this defendant was standing on the counter in the bank, after the description of robbers climbing from cage to cage over counters in the bank as has been introduced by the defendant, would indicate that those two items, his possession in the bank, his presence in the bank, and his possession of the money stolen from the bank, together constitute a case which is more than sufficient to go to the jury.

As pointed out by Mr. Green in one of the cases from which he read, an instance where the judge had apparently instructed the jury to disregard certain evidence because of the time elapsed between the stolen property in his possession, the court said on review:

433 "The weight of evidence of possession of stolen property, whether it be early or late, is a matter for the jury."

That expresses our feeling here. You cannot separate the possession of stolen property from the heel print.

I think for that reason the Government has presented evidence in a case more than adequate to go to the jury, who alone are qualified here to determine why the evidence we have presented proves the guilt of the defendant.

The Court: Do you want to say anything further?

Mr. Green: No, sir.

The Court: Your motion for acquittal will be overruled.

What about your instructions?

Mr. Green: I think we can submit certain instructions here now, your Honor.

The Court: Are you going to put on any evidence?

Mr. Green: We are, sir.

The Court: All right.

Then bring the instructions in here in the morning.

434 Mr. McGarr: I will have some rebuttal in the morning.

The Court: Fine.

The Clerk: How long will this case take? The case following is called for tomorrow morning.

Mr. Green: I don't think we will go to the jury until late tomorrow, if then.

The Court: What is tomorrow, Wednesday?

The Clerk: Wednesday, yes, sir.

The Court: Well, the other people can come in Thursday morning.

The Clerk: Yes, sir.

The Reporter. What about the numbering of the instructions, your Honor?

The Court: Oh, yes, we have rigid rules here about numbering the instructions. The instructions for the plaintiff will be numbered on the left-hand side at the bottom, and the defendant letters theirs in the right-hand corner at the bottom.

Mr. Green: Yes, sir.

Mr. McGarr: Yes, sir.

The Court: We will adjourn now until tomorrow morning at ten o'clock.

435 (Whereupon the further hearing of the above-entitled matter was continued until Wednesday, May 1st, 1957, at the hour of 10:00 o'clock a.m.)

436

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 56 CR 62) • •

TRANSCRIPT OF PROCEEDINGS

had in the above entitled case taken before the Hon. Michael L. Igoe, one of the Judges of said court, with a jury, in his court room in the United States Court House at Chicago, Illinois, on Wednesday, May 1, 1957 at 10 o'clock a.m.

Appearances:

Same as before.

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437 The Clerk: U. S. vs. Guido. Case on trial.

The Court: Do you have anything before the jury comes in?

Mr. Green: There is, your Honor.

The Court: Proceed.

(Whereupon the following took place outside of the presence and hearing of the jury.)

Mr. Green: After the closing of the Government's case, and after your Honor's ruling on the admissibility of the evidence which was taken from the box and was the substance of a search at the Pioneer Trust & Savings Bank and which had been, according to the evidence, rented by the defendant about five days prior to the search and under a name other than the defendant, under which he was indicted, we become completely concerned about the state of the record in this case.

As a matter of an estimate I would say that probably 40 or 50 per cent of the entirety of the evidence in this case has dealt with the establishment of the opening of

an account under a name other than the true name of the defendant, by the defendant, and the deposit in that
438 account of $3150. Clearly such evidence, after the ruling of your Honor upon the motion to suppress had been made and overruled, was admissible for the purpose of connecting the $50 bills and the $10 bills with the defendant. There is no doubt about that at all. But it was admissible for that purpose and for that purpose only.

Now that the rulings of the Court have been such as to exclude the very basis and predication for the admissibility of this other evidence what remains before the jury?

There remains before the jury these facts, all of which are not only inadmissible, but are greatly prejudicial. That is, that the defendant did rent this box under this name, and he did have a great amount of money in there.

I don't think there is any quarrel but what that is inadmissible and should be stricken. Our concern is that no instructions of this Court which it may give to the jury advising this jury that the evidence in that regard should be disregarded by them, in view of the fact that so much of the Government's case has rested upon the establishment of the opening of that box, and a great deal
439 more would have rested upon it if the stipulation had not been made as to the identity of certain writings. I don't think that any instruction that your Honor might give could have any possibility of causing the jurors to divorce that from their consideration in this case. I don't see how we can fairly be required to go ahead with the state of the record as such and, therefore, I now make the appropriate motion for a mistrial because of the great volume of such evidence which has been introduced.

Mr. McGarr: I think counsel's characterization of the evidence concerning the box as 50 per cent of the evidence is given far more weight than it has to the trial. Actually,

the primary evidence which is before the jury is to the effect the defendant had this box and it was his, although rented under an assumed name. That was by stipulation.

The purpose, as the Government freely admits, of introducing this evidence was our thought that the $50 bills with the pencil notes identified by the bank witness was appropriate and admissible, and the five $10 bills in
440 the serial sequence were admissible, all of which had come from the box.

However, that has not been the preponderance of the evidence in this trial. One agent has testified here that he went to the bank, took that money out, and the amount of the money was identified and there has been little or no other comment upon it except the attempts of the Government to get in the identifying markings on the bills through the witness, whom your Honor found to be either confused or not credible. I don't think there has been any prejudice at all. I would be very happy to agree to any instruction which your Honor might want to give in the course of instructing the jury, or might even suggest an admonition to the jury now, that since there has been no connection shown between the money in the bank, and the money taken from the Maywood Bank, the jury is to disregard whatever information has gone to the jury in this regard, and certainly need not be considered prejudicial and can be cured by a proper instruction.

The Court: The motion made by Mr. Green will
441 be overruled. You may prepare an instruction to take care of the situation which we are now discussing, or we will follow the suggestion made by the attorney for the United States to the effect that the jury at the present time be admonished; that in so far as the evidence concerning the box and what was taken from the box may be concerned, that should be eliminated from the case entirely, and they should dismiss it from their minds,

and dismissed from any further consideration in so far as this case is concerned. You can do it one way or the other, whichever way you suggest.

Mr. Green: It would be my thought that no conceivable harm would result from an admonition at this time. We are proceeding with the case and I think we should have such an admonition at this time, your Honor.

The Court: That is, they will be admonished to disregard the testimony, all the testimony concerning the box and the contents thereof.

Mr. Green: I think we do have a form of an instruction that we did prepare.

The Court: Let us see it.

442 You have stipulated here that the box was rented by your client under an assumed name.

Mr. Green: I offer to your Honor defendant's instruction lettered as "H" which was prepared by us for delivery to the jury in the event the matter goes to the jury at the conclusion of the trial.

(Whereupon Mr. Green handed a document to the court.)

Mr. Green: There may be some modification in that instruction which your Honor deems necessary because of the delivery at this time.

Mr. McGarr: I have no objection to it as a statement or an appropriate statement which your Honor should tell the jury.

The Court: There is just left in the case in so far as the box is concerned a stipulation to the effect that it was rented by the defendant under another name. That is still in here.

Mr. Green: I don't believe that is true, sir. I would say that was a stipulation which was made in order to identify that box with the defendant. The fact that the

renting of the box now, that the contents are not admissible, I think is also—

443 The Court: If the Government has no objection we will give this admonition to the jury right now.

Bring the jury in please.

Will you be ready to proceed then?

Mr. Green: We are ready to proceed.

The Court: All right.

(Whereupon the following took place in the presence and hearing of the jury.)

444 The Court: Good morning, ladies and gentlemen, of the jury.

The Jurors: (In unison) Good morning, your Honor.

The Court: During your absence there has been under discussion certain questions of law that are involved in and around the safety deposit box that was in the Pioneer State Bank over on the West Side, and after listening to the arguments by attorney for the Government and the attorney for the defense we have reached a conclusion that all of the evidence in connection with that box should be eliminated from the trial, and should be erased from your minds as best as that can be done. And you are specifically admonished as follows:

"During the course of this trial you were permitted to hear evidence relative to the defendant renting a safety deposit box at the Pioneer Trust & Savings Bank in Chicago on January 14, 1956, and that there was subsequently taken from that box by members of the Federal Bureau of Investigation $3150. You
445 are now instructed that all the evidence relating to this box and the money contained therein is improper and you are in no way to consider the same in arriving at your verdict and you are also instructed to disregard it in its entirety."

So you will eliminate that feature of this case from your minds completely.

All right, produce your witnesses.

Thereupon The Defendant To Maintain The Issues In His Behalf, Introduced The Following Evidence, To-Wit:

Mr. Green: Your Honor, we have two formal witnesses for the identification of certain documentary evidence. They be somewhat out of order, but the documents will not be offered until they are through.

The Court: All right.

Mr. Green: We will call Mr. Prispel.

The Clerk: Will the witness be sworn?

(Witness duly sworn).

446 EDWARD C. PRISPEL, called as a witness in behalf of the defense, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Green.

Q. Will you state your name, sir?

By the Witness:

A. Edward C. Prispel.

The Reporter: Will you spell your last name?

The Witness: P-r-i-s-p-e-l.

By Mr. Green:

Q. Where do you live?

By the Witness:

A. 1221 North Taylor, Oak Park.

Q. Mr. Prispel, what is your business or occupation?

A. I am an officer of Sears-Community State Bank.

Q. And that Sears-Community State Bank is located where?

A. At Homan Avenue and Arthington.

Q. Here in the City of Chicago?

447 A. Right, sir.

Q. You are here this morning in response to a subpoena duces tecum that was served upon your bank, is that so?

A. I am.

Q. And have you brought with you pursuant to that subpoena certain records?

A. I have.

Q. Do you have those records with you?

A. I have.

Q. May I have them?

A. Yes, sir.

(Whereupon the witness handed to Mr. Green some documents.)

Mr. Green: I would like to have these marked as Defendant's Exhibits 4, 5, 6, 7, 8, 9 and 10.

(Whereupon said documents were marked Defendant's Exhibits 4, 5, 6, 7, 8, 9 and 10 for identification).

By Mr. Green:

Q. Now, all of the documents which you have produced in court this morning are maintained by your bank in doing its regular business?

448 By the Witness:

A. That is right.

Q. And they correctly reflect the transactions to which they relate?

A. They do.

Q. I hand you first this card which has been marked for identification as Defendant's Exhibit 4, and ask you what that document is?

A. That is the signature card of the proposed persons in this case.

The Court: Signature card of what?

The Witness: Of the proposed persons in this case.

By Mr. Green:

Q. That is, Nicholas Guido and Grace Guido?

By the Witness:

A. That is correct.

Q. That is a document that was prepared by you on the date the account was opened in your bank?

A. That is right.

Q. And the date shown on this card is the true and correct date when such an account was opened, is that right?

A. It is.

449 Q. I now hand you Defendant's Exhibit 5 for identification, and ask you what that record is?

A. This is our ledger card where we keep our record of it

Q. Relating to the account in question?

A. Relating to the account in question, yes, sir.

Q. What does the document which you just designated as your ledger card disclose as regard to its contents?

A. It discloses the amount of the deposit, and also the amount of the withdrawals, and the dates thereof.

Q. And the date of such deposits and withdrawals?

A. That is right.

Q. I now show you Defendant's Exhibit 6 for identification, and ask you what that document is?

A. This is the original deposit ticket when the amount is deposited in the account, when the account was opened.

Q. For the account in question, is that right?

A. That is right.

Q. I now show you Defendant's Exhibit No. 7 for identification, and ask you what that document is?

450 A. This is a withdrawal made on the above account, and does mention the date of October 24, 1955.

Q. Showing the date and the amount of such withdrawal?

A. Showing the date and the amount of such withdrawal, signed by the two.

Q. And in that regard, upon the examination of your records, was this a joint account, or was it a separate account?

A. No, this was a joint account, both signatures were necessary.

Q. In other words, neither of the persons on the account could withdraw any money without the signature of the other?

A. That is right.

Q. Now, passing to Defendant's Exhibit 8 for identification, I will ask you to tell us what that record indicates?

A. This is another withdrawal, showing the date and the amount of the withdrawal on this account.

Q. And that is—

A. It is signed by Grace and Nick Guido.

Q. And that withdrawal would have been made upon the date that this bears?

451 A. That is right.

Q. I will ask you the same question concerning Defendant's Exhibit 9 for identification.

A. This is another withdrawal, showing the date and the amount. It is also signed by the two principals in the account.

Q. Finally, I show you Defendant's Exhibit 10 for identification.

A. This is also a withdrawal, showing the date and the amount, and signed by both.

Q. Both of the principals of the account?

A. That is right.

Mr. Green: I would like to have this marked as Defendant's Exhibit 11 for identification.

(Whereupon said document was marked Defendant's Exhibit No. 11 for identification).

By Mr. Green:

Q. I hand you this book marked Defendant's Exhibit 11 for identification, and ask you if you are able to recognise this document?

By the Witness:

A. This is our pass book that we issue when the
452 account is opened up, showing the amount of the deposits and the withdrawals by these persons.

Q. And the dates of each?

A. The dates are put in there, yes, sir.

Mr. Green: Mr. McGarr, I would like to have you look at this.

I would like to have leave to photostat it and let him take it back to the bank.

Mr. McGarr: All right.

Mr. Green: Your Honor, we would like to have leave to substitute the original for a photostat of this.

Mr. McGarr: No objection.

The Court: All right.

Mr. Green: That is all of this witness.

The Court: Cross examine.

Cross Examination by Mr. McGarr.

Q. Mr. Prispel, what is your position with the bank?

By the Witness:

A. I am the assistant cashier.

Q. Are you the person who takes care of a cus-
453 tomer who opens a new account?

A. Oh, no, I am not generally.

Q. Do you have clerks who do that?

A. Yes, sir.

Q. I thought I understood you to say that you took the opening of this account, or took the required form?

A. No, I am not.

Q. Then I misunderstood you.

Now, on a joint account may either party withdraw from the account?

A. Not the way this account is opened up because this an account where both signatures are required.

Q. Do both persons have to be present in the bank?

A. Not necessarily. One of them could sign it, and the other one could bring it down and we will accept it.

Q. I didn't hear you.

A. Both people do not have to be present. They both have to sign. One can bring it down and have the other's signature on the withdrawal ticket.

Q. Is that account still current in your bank, or 454 has it been closed?

A. No, that has been closed.

Q. I show you Defendant's Exhibit 10, are you able to ascertain on what date the account was closed?

A. That was closed on January 30, 1956.

Q. And on what date was it opened? Are you able to tell from that document?

A. It was opened September 28, 1955.

Mr. McGarr: That will be all.

Thank you.

(Witness excused).

Mr. Green: We will call Mr. Palempini.

The Clerk: Will the witness be sworn?

(Witness duly sworn.)

JAMES PALEMPINI, called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Gorman.

Q. Will you state your name, please?

By the Witness:

A. James Palempini.

455 Q. Will you spell your name for the reporter?

A. P-a-l-e-m-p-i-n-i.

Q. Where do you live, Mr. Palempini?

A. My office or my residence?

Q. Your residence.

A. 1040 North East Avenue, Oak Park.

Q. What is your business or occupation?

A. Real estate broker.

Q. Where is your place of business?

A. 5627 West Division Street.

Q. Now, Mr. Palempini, do you appear here today pursuant to a subpoena that was served on you?

A. Yes, sir.

Q. And that subpoena ordered you to produce certain documents, books and records, did it not?

A. Yes.

Q. Did you produce those records?

A. Yes, sir.

Q. Do you have them with you?

A. Yes, sir.

Q. May I have them please?

A. Yes.

(Whereupon the witness handed the documents to Mr. Gorman).

456 By Mr. Gorman:

Q. I would like to have this marked as Defendant's Exhibit 12 for identification.

(Whereupon said document was marked Defendant's Exhibit 12 for identification).

By Mr. Gorman:

Q. Mr. Palempini, do you know the defendant in this case, Nicholas Guido?

By the Witness:

A. Yes, by the name of Milo.

Q. I beg your pardon?

A. By the name of Milo.

Q. Will you point him out, please?

A. Right there (indicating).

Q. The second gentleman?

A. Yes.

Mr. Gorman: Indicating for the purpose of the record, the defendant Nicholas Guido.

By Mr. Gorman:

Q. Now, calling your attention to November 11, 1955 did you have an occasion to have any business dealings with the defendant?

457 By the Witness:

A. November 11?

Q. I beg your pardon.

Strike that.

(Question withdrawn)

By Mr. Gorman:

Q. On November 3, 1955?

By the Witness:

A. Yes, sir.

Q. Did you see the defendant on that day?

A. Yes, sir.

Q. Where did you see him?

A. In my office.

Q. Where did you say your office was located?

A. 5627 West Division.

Q. What was the nature of the business transaction which you had with the defendant on that day?

A. I rented him an apartment.

Q. During the course of that transaction, did you have an occasion to receive anything from the defendant?

A. Yes.

Q. What was it you received?

A. A deposit on the apartment.

458 Q. A deposit on the apartment?

A. Yes.

Q. Did you have an occasion to issue the defendant a receipt at that time?

A. Yes, I did.

Q. Calling your attention to Defendant's Exhibit 12 for identification, and specifically to the page with the date at the top 11-3-55, I will ask you if that is the stub of your receipt about which you have just testified?

A. Yes, it is.

Q. And was this receipt or stub of a receipt prepared in the regular course of your business?

A. Yes.

Q. Was this kept as a book of record of your business?

A. Yes, it was.

Q. Do you know the location of the apartment which you rented to the defendant at that time?

A. Yes, sir.

Q. What was the location of that apartment?

A. 5820 West Division Street.

Q. Now, do you know if the defendant who rented that apartment moved in on that date?

459 A. Pardon?

Q. Do you know if the defendant moved into that apartment on that date?

A. No, sir.

Q. What day, if you know, did the defendant move into that apartment?

A. On the 4th. The day afterward.

Q. That would be the 4th of November, 1955?

A. Yes, sir.

Q. Did you have an occasion to see the defendant on the 4th of November, 1955?

A. No, sir.

Q. Did the defendant visit your place of business on that day, if you know?

A. Yes, sir.

Q. Calling your attention again to Defendant's Exhibit 12 for identification, and specifically to the page with the inscription on the top, 11-4-55, I will ask you if you know what that is?

A. Yes, it is the balance of the month's rent.

Q. This is what?

A. It is the balance of the month's rent for the apartment.

Q. This is a receipt.

460 A. A stub of the receipt.

Q. Did you place the handwriting on this stub?

A. No, that was my secretary.

Q. Who is your secretary?

A. Mrs. Walgron.

The Reporter: Will you spell the last name?

The Witness: W-a-l-g-r-o-n.

Gertrude is the first name.

By Mr. Gorman:

Q. Do you recognize that handwriting as being hers?

By the Witness:

A. Yes, sir.

Q. Was that issued in the regular course of business?

A. Yes, sir.

Q. Was it the regular course of your business to issue such a receipt at that time?

A. Yes, sir.

Q. How long has Mrs. Walgron been working for you?

A. About 12 years.

Mr. Gorman: No further questions.

461 *Cross Examination by Mr. McGarr.*

Q. Mr. Palempini, prior to November 3, 1955 had you ever seen this man who has been identified as Milo?

By the Witness:

A. No, sir.

Q. He just came into your office?

A. Yes, sir.

Q. Did you see him there in your office on November 3d?

A. Yes, sir.

Q. Was there anyone with him that you recall?

A. A young lady that was his wife.

Q. Was she introduced as Mrs. Milo?

A. Mrs. Milo.

Q. Do you remember what his first name was?

A. Donald.

Q. Donald Milo?

A. Yes.

Q. Did you see him again the next day November 4th in your office?

A. No, I didn't. I was out.

Q. You said he moved on November 4th?

462 A. Yes.

Q. Did you see him move?

A. No, I didn't; but he receive the key at the time he paid the balance of the rent.

Q. In other words, when he came in on the 4th he received the key?

A. That is right.

Q. Do you know of your own knowledge that he moved into the apartment on that day?

A. I won't say because I didn't see him move.

Mr. McGarr. No further questions.

The Court: That is all.

(Witness excused)

Mr. Green: May we retain this (indicating a document)?

Mr. Palempini: Yes, sir.

Mr. Green: It will be available if he needs it.

Mr. Palempini: When you are through with it?

Mr. Green: Yes, sir.

Thank you.

Mr. Green: We will call Mrs. Binnie.

The Clerk: Will the witness be sworn?

(Witness duly sworn)

463 EVELYN BINNIE, called as a witness in behalf of the defendant, having been first duly sworn was examined and testified as follows:

Direct Examination by Mr. Green.

Q. Will you please state your name?

By the Witness:

A. Mrs. Evelyn Binnie.

The Reporter: Will you spell your last name, please?

The Witness: B-i-n-n-i-e.

By Mr. Green:

Q. I would like to have you speak up loudly so the last lady and gentleman and his Honor are able to hear you.

By the Witness:

A. Yes, sir.

Q. Where do you live, Mrs. Binnie?
A. 101 Wolf Road, Mount Prospect.
Q. Are you married or single?
A. Married.
Q. Mrs. Binnie, are you acquainted with the defendant in this case, Nicholas Guido?
464 A. Yes, sir.
Q. Will you point him out, please?
A. There (indicating).
Mr. Green: Indicating for the sake of the record, the defendant Nicholas Guido.
By Mr. Green:
Q. How long have you known him?
By the Witness:
A. Better than three years.
Q. During that period of three years, when you have known him, have you had an occasion to see him quite frequently?
A. Yes, sir.
Q. Directing your attention to the 4th day of November, 1955, did you have an occasion to see the defendant, Nicholas Guido, on that day?
A. Yes, sir.
Q. Will you state the time you first saw him on that day?
A. Approximately 5 o'clock in the afternoon.
Q. Where was that?
A. In his apartment.
Q. And that apartment was located where, Mrs.
465 Binnie?
A. In the 5800 block of—I think I am mistaken. It was 1200 north.
Q. 5800 west or north?
A. It was across the street from the Roxy Theatre. It was Division Street.

Q. Who was present at that time?

A. Both of my daughters.

Q. And they are who?

A. Patricia Nugent and Corine Guzy.

Q. Was there anyone else present other than yourself, your daughters and Guido?

A. No.

Q. Will you state to the Court and jury the reason for your seeing the defendant?

A. My daughter Patricia called me the night before and told me--

Q. Patricia Nugent?

A. Yes. She told me they were moving to this apartment.

Q. That is the apartment on Division, is that correct?

A. Yes. So I told her I would come over and help her pack in the evening. The other daughter was at home 466 at the time she said she would take a ride with me. We got over there about five.

Q. Where were you living at that time?

A. 3923 Neva.

I figured if they were moving they wouldn't have time to cook so I made a pot of soup during the day and put it in a container to keep it hot. There were some bowls and we had some soup.

Q. What time did you arrive there?

A. Around five.

I drove over myself and parked on a side street around the corner. It was the first street there. So, we had the bowls of soup.

Q. You and your daughter Corine were in the apartment?

A. Yes.

So, we sat around talking for a few minutes and we had some coke.

Q. When you arrived there at the apartment, who was there?

A. Patricia and Nick.

So the younger girl—we looked across the street
467 to the show and saw that Grace Kelly was playing there.

Q. About what time was that?

A. Oh, between five and 5:30. Nick said, "The three of you should go to the show. I will have to stay here. I have got some work to do."

One of them suggested that he leave a note on the door for the moving men. So, he left a note on the door and we went over and we got in the show between 5:30 and siv, or about that time.

Q. How long did you remain in the show?

A. Well, we got out, I would say, between 8:30 and nine, because I had to be home before ten.

Q. And during the motion picture, was Mr. Guido present during the entire show?

A. Yes, he sat with us. He went back on one occasion to get some pop corn, right after we got in. He was gone approximately five minutes. Then about the middle of the last part he went back and got some candy and he was gone about five minutes. The rest of the time he was with us girls.

Q. You are positive of that?

A. Yes, sir.

468 Q. Can you give us the approximate hour you left the show?

A. Around 9:30, I would say.

Q. Did the four of you leave the show together?

A. Yes, sir.

Q. What did you then do?

A. Well, we walked across the street and stopped and talked to them on the sidewalk for a few minutes.

Q. When you say "we", you mean whom?

A. Patrick, Corine, and myself, and Nick. We talked to them in front of the house for a few minutes and the younger girl and I walked around the corner and got in my car and we went home.

Q. You didn't see him again that day, is that correct?

A. No. The last I saw him was around 9:30, I think.

Mr. Green: You may cross examine.

Cross Examination by Mr. McGarr.

Q. Mrs. Binnie, how long did you say you have known Nick Guido?

469 A. Better than three years.

Q. How did you first meet him?

A. Well, my daughter brought him to the house.

Q. Is your daughter married or single?

A. She is single now.

Q. Single?

A. Yes.

Q. Has she ever been married to Nicholas Guido?

A. No.

Q. You say the four of you went to the Roxy Theatre on that evening?

A. Yes, sir.

Q. With Nicholas Guido?

A. Yes, and the two daughters and myself.

Q. Do you see this Nicholas Guido you are talking about in the court room?

A. Yes. He is right over there (indicating).

Q. And the four of you stayed there for what, one feature or two features?

A. One of the features, I don't know which, had already started when we went in. We saw the rest of that, and all of the second feature, and then we left.

Q. Do you remember the name of the movie that
470 you saw?

A. The one that we specially went over to see was Grace Kelly and Cary Grant in "To Catch A Thief". And the other one was—I don't remember the name of it, but it was about a woman in an insane asylum. I believe she was Gloria Graham in that one.

Q. During the course of your stay in the movie, did Patricia leave the seat at all?

A. No.

Q. She remained in her seat the entire time?

A. Both of the girls. The best I remember it, both of the girls did.

Q. Did you leave your seat at all?

A. No.

Q. When you left the movies, did you all go out together?

A. Yes, we all filed out together.

Q. You say the only two times that Nicholas Guido left was to buy pop corn or to buy candy?

A. Yes.

Q. He was gone a very short time?

A. Just long enough to go to the candy counter and back.

471 Q. I understand that your daughter Patricia—just so to not make it confusing—your daughter Patricia stayed in the seat with you the whole time?

A. Yes.

Mr. McGarr: No further questions.

Mr. Green: That is all.

The Court: That is all, Madam.

(Witness excused).

Mr. Green: We will call Miss Guzy.

The Clerk: Will you be sworn?

(Witness duly sworn).

CORINE GUZY, called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Gorman.

Q. Will you state your name?

By the Witness:

A. Corine Guzy.

Q. Will you spell your last name?

A. G-u-z-y.

Q. Will you keep your voice up so the last lady 472 and gentleman here can hear you?

A. Yes, sir.

Q. Where do you live, Mrs. Guzy?

A. 4309 North Tripp Avenue.

Q. Mrs. Guzy, do you know the defendant in this case, Nicholas Guido?

A. Yes, I do.

Q. Will you point him out, please.

A. Over there (indicating).

Mr. Gorman: Indicating for the record, the defendant, Nicholas Guido.

By Mr. Gorman:

Q. How long have you know the defendant, Nicholas Guido?

A. About three years.

Q. Calling your attention to November 4, 1955, did you have an occasion to see the defendant, Nicholas Guido?

A. Yes, I did.

Q. Where was it you first saw him on that day?

A. At his apartment.

Q. Where was that apartment, if you recall?

A. It was on Division Avenue about—somewhere be-

tween Central and Austin Avenue.

473 Q. The exact address you don't recall?

A. No, I don't.

Q. About what time of the day or night was it when you first saw the defendant at that time?

A. It was some time between 4 and 5.

Q. In the afternoon?

A. Yes, sir.

Q. Who was present when you first saw the defendant?

A. Nick, my sister Pat, and my mother and myself.

Q. Will you identify your sister Pat and your mother by name, please?

A. Mrs. Evelyn Binnie, and Patricia Nugent.

Q. What was the occasion of your being in that apartment at that time?

A. We went over to help them straighten up their apartment. They had just moved.

Q. Whom do you mean by we went over?

A. My mother and myself.

Q. When you arrived at the apartment, what, if anything, did you do?

A. Well, we ate some soup, and we sat around and talked for a few minutes, and I suggested that we go to the show which was right across the street from

474 there.

Q. And what show was that, if you recall?

A. The name of the show?

Q. Yes.

A. The Roxy Theatre.

Q. Did you go to the show?

A. Yes.

Q. Who went to the show with you?

A. Nick, my sister Patricia, my mother and myself.

Q. About what time was it that you arrived at the Roxy Theatre?

A. I would say, sometime between 5:30 and six.

Q. How long did you stay in the theatre?

A. I don't know for sure. It was around 8:30 or 9 o'clock when we got out.

Q. Were all four of you in the theatre during that time?

A. Yes, sir.

Q. Was the defendant, Nicholas Guido, with you in the theatre during that time?

A. Yes, he was.

Q. When you left the theatre, what did you do?

A. Well, we talked to him a few minutes outside of the theatre and then we went home.

475 Mr. Gorman: That is all.

Cross Examination by Mr. McGarr.

Q. Do you remember the name of the movie that was playing that night?

A. Yes, it was Grace Kelly playing in the picture called "To Catch a Thief".

Q. Do you remember the name of the other feature if there was one?

A. There was another one, but I don't remember the name of it. It was something about an insane asylum.

Q. And you, your mother, Patricia and Nicholas were sitting together, is that right?

A. That is right.

Q. Didn't Nick leave his seat several times in the course of that movie?

A. Well, once or twice he left to get some popcorn and candy.

Q. How long was he gone?

A. Oh, about five minutes or so.

Q. When you left did you all leave together?

A. Yes, we did.

Q. Did Patricia leave her seat during the course
476 of this movie?

A. I don't recall whether she did or not.

Q. You say you saw this movie on November 4, 1955, is that correct?

A. Yes, it is.

Q. How do you know it was that day?

A. Because I have been talking about it with Nick and my mother and my sister for about a year and a half now.

Q. When did you first start talking together about it?

A. After Nick was arrested in January, 1956.

Q. You then decided it was on November 4th that you had seen this movie, is that right?

A. I knew we had been to the show that night, yes.

Mr. McGarr: No further questions.

Redirect Examination by Mr. Gorman.

Q. Just one question.

You also know that the day you went to that movie was the day the defendant, Nicholas Guido and Patricia moved, do you not?

By The Witness:

477 A. That is right.

Mr. Gorman: That is all.

The Court: That is all, Madam.

(Witness excused)

Mr. Green: We will call Mr. Spagnoli.

The Clerk: Will you raise your right hand and be sworn?

(Witness duly sworn)

JOSEPH SPAGNOLI, called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Green.

Q. Will you state your name?

By The Witness:

A. Joseph Spagnoli.

Q. Will you spell your last name?

A. S-p-a-g-n-o-l-i.

Q. Where do you live, Mr. Spagnoli?

A. 3346 West Lexington.

Q. Is that in the city of Chicago?

A. Yes, sir.

Q. Are you acquainted with the defendant, Nicho-
478 las Guido, in this case?

A. Yes, sir.

Q. Will you please point him out?

A. Right over there (indicating).

Mr. Green: Indicating for the record, the defendant, Nicholas Guido.

By Mr. Green:

Q. Did you have an occasion on November 4, 1955 to see the defendant, Nicholas Guido?

By The Witness:

A. Yes, sir.

Q. At what time did you first see him that day?

A. He woke me up around—well, it was before noon. It was around 10 o'clock. At 10 o'clock or 10:15 or something like that.

Q. He woke you up by what means?

A. To give him a hand; to help him move.

Q. Did you see him at that time?

A. Yes, sir.

Q. At that time, did you say it was to give him a hand?

A. Yes, sir. To help him move.

Q. What did he want you to move, Mr. Spagnoli?

A. He wanted me to go to his apartment and help
479 move some stuff to another address.

Q. To what address did he want you to go?

A. It was on Division Street.

Q. And from what address did he want you to move this stuff?

A. I don't know the exact address, but it is on Beacon Street, by the school.

Q. Did you later go there that day to the Beacon Street address?

A. I went there in the morning. It must have been—it was before noon because I got up about a quarter after ten or 10 o'clock, and I had breakfast, and I went straight there.

Q. And when you arrived at the Beacon Str et address shortly before noon on the 4th, who did you see there at that time?

A. I seen Nick and Pat.

Q. Patricia Nugent, is that right?

A. Yes.

Q. What did you do then?

A. Well, then I went in, and I put some stuff in my trunk. I took some stuff and put it in the trunk of my car.

Q. What did you do after you placed the material
480 in the trunk of the car that he wanted to move?

A. I went straight home then because I had some work around the house to do.

Q. What did you later do with the material that you placed in the car that day, if anything?

A. He told me where the building was. He gave me an address on a piece of paper. So, I brought the stuff to the Division Street address.

Q. What time did you arrive at the Division Street address?

A. The exact time I don't know, but it was dark out.

Q. Will you give us the approximate time, Mr. Spagnoli?

A. It could have been five or 5:30.

Q. Did you see Nick, the defendant, there when you arrived?

A. No.

Q. What did you observe when you arrived at those premises on that evening?

A. Well, I pulled up in front, walked up to see if it was the address he had on it, and I went up there and I knocked on the door. There was a note by the door,
481 between the door knob and the wall. So, I read the note.

Q. Do you remember the contents of that note now?

A. Not word for word.

Q. What was the effect of that note?

A. It was like, "Went to the movies across the street; go round the back. The back door is unlocked," and if I go in the back door I could unlock the front door and I could put the stuff in the house, if I needed to. In other words, if I really needed to do it. And if I needed him he was in the movies.

Q. What did you do after you arrived at the front door and saw that note?

A. Then I went around to the back door and opened the door.

Q. Did you then put this clothing or material in the house?

A. Yes, sir.

Q. What did you do then? You waited around there for awhile waiting for him, is that right?

A. Well, no. There was a television there away from

the wall. So I pushed the television against the wall and plugged it in, and then it come on; it just happened to come on. So, I watched it for a little while. You
482 know, I adjusted it. It was blurry.

Q. How long did you remain there?

A. I couldn't tell you. It could have been 20 minutes to an hour or 50 minutes. I was watching something on the television.

Q. Did you then leave the apartment on Division Street?

A. Yes.

Q. About what time was it you left the apartment on Division Street?

A. Well, as long as it would take me to unload the car.

Q. Give us the approximate time of day, if you can.

A. Well, I figure, say, I got there at 5:30, and 15 or 20 minutes to go through the movements—

Q. Approximately. Would you say it was approximately an hour?

A. Approximately an hour. It could have been.

Q. Did Mr. Guido return to that apartment during that time?

A. While I was there?

Q. Yes.

483 A. No, sir.

Mr. Green: That is all.

Cross Examination by Mr. McGarr.

Q. You regard yourself as Mr. Guido's best friend, do you not, Mr. Spagnoli?

By The Witness:

A. A friend of his.

Q. How long have you know him?

A. Oh, about five years.

Q. What is your business or occupation?

A. I work for my father.

Q. What type of work does he do?

A. Carpenter, handyman, ex-butcher.

Q. You said you put some stuff in your trunk from Nicholas Guido's old address on that particular day?

A. Yes, sir.

Q. What date was that, if you recall?

A. It was November 4th.

Q. What year?

A. 1955.

Q. How do you know what date it was?

A. I didn't know. When he come and approached me about it, told me about it, I told him, "Well, I don't
484 know what day it was, the date." He said, "Well, remember the day you helped me move?" I said, "I remember the day I helped you move, but I don't remember the date."

So, he took me over to the real estate office and he proved to me what date it was. Otherwise, as far as the date, I don't know.

Q. What day of the week was it, do you recall?

A. No, I don't.

Q. What items did you put in the trunk at the Magnolia address?

A. Well, it was an armful of clothing; maybe two or three suit cases, a couple boxes.

Q. What kind of a car was this?

A. A 1950 Cadillac.

Q. Was it yours?

A. Yes, sir.

Q. What did you do with that note you found in the hall?

A. I don't remember.

Q. Did you make any attempt to locate Nick in the movie?

A. No.

Q. Do you know the movie he was referring to?

A. Across the street.

485 Q. Do you know the name of it?

A. No.

Q. Did you see the movie across the street?

A. Did I see the movie?

Q. I mean, did you see the theatre across the street from the apartment?

A. Oh, yes. It is right by there. You can't miss it.

Q. How long did you watch the television?

A. It could have been 20 to 50 minutes. I don't know. Maybe a half hour or an hour.

Q. Do you remember what you were watching?—

A. No. It was interesting though.

Q. Was there an aerial on this set?

A. An aerial on the set?

Q. Yes.

A. I don't remember. I never thought I would have to remember all these things in the future, see.

Q. Well, when you turned on the set, did you get a picture?

A. It was blurry.

Q. You sat there watching a blurry picture?

A. No. I was monkeying around with the dials.

486 I don't remember what it was.

Q. Did you make more than one trip carrying things for Nicholas Guido?

A. You mean, from house to house?

Q. Yes.

A. No.

Q. When you were over at Magnolia picking up this stuff, did you put anything in the body of your car, as distinguished from the trunk?

A. I wasn't on Magnolia.

Mr. Green: I object.

By Mr. McGarr:

Q. Pardon?

By The Witness:

A. I wasn't on Magnolia.

Q. Where did you pick up this stuff that you moved for Nick?

A. On Beacon.

Q. On Beacon?

A. Yes, sir.

Q. I am sorry.

When you loaded the car on Beacon, did you load it all in the trunk of the car?

A. That's right.

487 Q. And you had some clothing and three suit cases?

A. It could have been two or three suit cases. I didn't chalk it down what it was.

Q. Did you put anything in the back of your car other than the trunk? I mean, the back seat or the front seat?

A. No.

Q. Did you notice when you were at the Beacon Street address whether there was a truck helping them move?

A. No, there was no truck there.

Q. Do you know whether they had a truck?

A. All the furniture was there.

Q. What time was it you said Nick first called you that day?

A. It was in the morning, ten or 10:15.

Q. And then what time did you get to the Beacon Street address?

A. Well, figure it out. It takes about 30 minutes to get there, and by the time I washed up and eat breakfast and got dressed, it was another 15 minutes.

Q. Did you help him carry anything else out of the apartment other than what you put in your car?

A. No.

488 Q. When he called you on the phone in the morning, what did he say?

A. He didn't tell me on the phone.

Q. How did he get in touch with you?

A. He came over.

Q. What did he say when he came over?

A. If I would please give him a hand.

Q. And all you did was to put the three suit cases in your trunk?

A. And a couple boxes and an armful of clothing.

Q. Two boxes, where did they go?

A. Why, everything went to the same house.

Q. Where did you store the boxes in your car?

A. I didn't store them. I just put them in the trunk.

Q. You had the three suit cases and a couple boxes in the trunk of your car?

A. Yes.

Q. And you delivered them to the Division Street address seven or eight hours after you picked them up at the Beacon Street address?

A. No, not seven or eight hours, no.

Q. What time did you arrive there? The Division Street address?

489 A. Well, I am not sure of the exact time, but it was dark out.

Q. Will you give us the approximate time?

A. Like I said before, it could have been five or 5:30 or something like that.

Q. Could it have been 4:30?

A. I doubt it. It was light out at 4:30.

Mr. McGarr: No further questions.

The Court: That is all.

(Witness excused)

The Court: I think we should take a recess before you start your next witness.

(Recess taken)

The Court: Proceed.

Mr. Green: We will call Mr. Guido.

The Clerk: Will you raise your right hand and be sworn?

Mr. Guido: Yes, sir.

(Witness duly sworn)

NICHOLAS GUIDO, the defendant, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

490 *Direct Examination by Mr. Green.*

Q. Mr. Guido, I want you to talk up so that the last lady and gentleman of the jury can hear you.

By The Witness:

A. Yes, sir.

Q. Will you please tell us your name?

A. Nicholas Guido.

Q. You are the defendant in this case, are you not, sir?

A. Yes, sir.

Q. Where do you live, Mr. Guido?

A At the present time I live at 4624—I believe that is the correct address—North Spaulding.

Q. Mr. Guido, have you ever been convicted of crimes?

A. Yes, sir.

Q. On how many occasions?

A. Two.

Q. When was your first conviction for a felony, sir?

A. I believe it was in 1939. Then also again in 1942.

Q. For what crimes were you convicted?

A. Larceny, I believe.

491 Q. On both occasions?

A. Yes, sir.

Q. As a result of those convictions, did you at any time serve a sentence or sentences in a penitentiary?

A. Yes, sir, I did.

Q. When was the first time, sir, that you served a sentence in a penitentiary?

A. In 1939.

Q. For how long did you remain there?

A. About five years.

Q. The second time, sir?

A. The second time in 1942, approximately six years.

Q. In other words, you remained in the penitentiary then until approximately 1948?

A. Yes, sir, around that.

Q. Mr. Guido, I would like to have you relate to the Court and Jury your doings and whereabouts on the 4th day of November, 1955, which was the date testified here as being a robbery at the Maywood Proviso Bank.

A. Well, to the best of my recollection, and I went over this in my mind many times, I arose from bed at 492 the North Beacon address—

Q. What is that address?

A. That also was in the 4600 block—or 4446 North Beacon, I believe. I am not certain. I don't know if I am correct on that address or not.

Q. What time was that?

A. That was in the morning. Early in the morning.

Q. After that, what did you do?

A. I went over to the West Side and asked my wife if she would go along with me to the Sears Bank on Arthington.

Q. When you say you went to the West Side, you mean where?

A. To the—well, on the West Side is where my wife was living.

Q. Where is that?

A. On Kolin and 13th Street.

Q. Now, you are estranged from your wife presently?

A. For four years now, approximately.

Q. Do you have any children?

A. Three.

Q. And you support your children, is that correct?

A. Three children by my wife.

Q. You went to the address of your wife that 493 morning and did you see her then?

A. Yes, I did.

Q. What did you do thereafter?

A. Her and I went over to the Sears Bank on Arthington and Homan, I believe it is, and we withdrew $1800 out of that bank. It was necessary that we both go because we had a joint account there.

Q. When you got to the Sears Bank, did you sign any document at that time?

A. Yes, we did.

Q. Now, I will show you a photostat which is marked as Defendant's Exhibit 8 for identification, and I will ask you whether or not that document bears your signature?

A. It does, yes, sir.

Q. And that was signed by you at that time, on the date it bears, November 4, 1955, is that right?

A. Yes, sir.

Q. Did you then on that morning receive the sum of $1800?

A. I did.

Q. And what was next done by you?

A. Well, I drove my wife back to the apartment on Kolin Street.

494 Q. You say you drove her back, you mean you drove back from the Sears Bank to the address of your wife on Kolin Street.

A. Yes.

Q. What kind of a car were you driving at that time?

A. I believe I was driving a 1955 Cadillac.

Q. What time did you arrive back at your wife's address, if you remember?

A. I don't remember. It could have been 10 o'clock. It could have been even possibly 11 o'clock. I am not sure of that.

Q. What did you next do that day?

A. I drove over to Spagnoli's house.

Q. That is the witness who was just here on the stand?

A. Yes, sir.

Q. When did you arrive at Mr. Spagnoli's house?

A. It was in the morning sometime. I don't remember the time.

Q. What did you do there?

A. I got him out of bed and asked him if he could give me a hand. I had some valuables I wanted moved. I didn't trust the movers to carry on the truck. I
495 asked him if he would give me a hand and put some of these things in his trunk.

Q. Were you moving that day?

A. Yes, sir, I was.

Q. You were moving to what address?

A. To 5820 West Division.

Q. That is another apartment?

A. I was moving to the Division Street apartment.

Q. When did you rent the apartment on Division?

A. I rented it on the 3d of November.

Q. That was the day before?

A. Yes, sir.

I applied for the apartment on the 3d, and rented it on the 4th.

Q. Did you make any deposit on the apartment on the 3d?

A. Yes, sir, I did.

Q. In what amount, sir?

A. I think it was $50.00.

Q. Now, after you arrived at Mr. Spagnoli's house and had your business with Mr. Spagnoli, what did you do, on the 4th?

A. I called up a friend of mine that is in the moving business.

496 Q. Who was this friend you called?

A. Fred Waddy.

Q. What did you do after that?

A. I called up—are we talking about Fred Waddy?

Q. Yes.

A. I called him up and asked him what time he could come over to the address on North Beacon Street, because I had called him the day before and asked him if he would be available for the 4th, because I was moving, and he told me the truck was busy, that his father had the truck, and the truck wouldn't be available until some time in the afternoon.

It was then that I gave him the address on North Beacon and asked him to come up there as soon as he got the truck.

Q. What did you do after your conversation with Mr. Waddy?

A. I believe that I then drove over to the North Beacon address.

Q. What time did you arrive back at the North Beacon address.

A. Between 12 and 1 o'clock in the afternoon.

Q. Who was present at that time when you arrived at

the North Beacon address?

497 A. Joseph Spagnoli, Patricia Nugent, and myself.

Q. What was then done by you, or any of you in your presence?

A. We were packing up some of the furniture and things, putting things in boxes and getting prepared. Although we had worked on it the night previous. But we were fooling around with the kitchenware and things like that and getting everything ready for moving.

Q. Did anyone later thereafter come to the North Beacon Street address from which you were moving?

A. Yes, sir.

Q. Who came there?

A. Fred Waddy and two of his co-workers.

Q. What time did they arrive, if you know?

A. I would say about 1 o'clock.

Q. What was next done by you on the 4th day of November, 1955?

A. Well, as I recall it, Spagnoli came and left, and then Fred Waddy and his men came over.

We helped Fred Waddy. I did. As a matter of fact, I helped him with the couch. We put that—we put all the furniture on the truck, and I also put some of our personal things in the trunk of my car; clothing and the like,

498 and I gave Fred Waddy the address of the West Division address and asked him to meet us there.

However, I left first and before I arrived at the West Division address, we stopped along the way because I saw a cleaning rug plant, and I asked Fred to stop his truck, and I asked him if he would help take the rug off of the truck and have it cleaned at this particular cleaning plant. It was located somewhere on Irving Park. That is the route that we were taking toward West Division.

Q. What time did you leave the apartment on Beacon Street?

A. On Beacon Street?

Q. Yes.

A. I would say about, anywhere between 2 and 2:30, or possibly three.

Q. Now, did you go any place else after leaving the apartment on West Beacon Street?

A. Well, the cleaning plant, and then over to the real estate office, to the best of my recollection.

Q. And you arrived at the real estate office—that is the real estate office of Mr. Palempini; is that correct?

499 A. Yes, sir.

Q. He is the witness that was here this morning?

A. Yes, sir.

Q. What time did you get there?

A. I would say, between 2:30 and 3 o'clock. Somewhere along in there.

Q. Whom did you see when you arrived at the real estate office?

A. I saw his secretary.

Q. Do you know her name?

A. No, I don't.

Q. Did you have any business transaction with his secretary?

A. Yes, I did.

Q. And what was that business transaction?

A. That transaction was in regard to the key, and also the balance of the rent which I owed the real estate office for the apartment.

Q. Did you pay the balance of the rent?

A. Yes.

Q. And that was in what amount?

A. I believe the amount was about $36.00 or $46.00. I don't quite remember.

Q. You received the key, is that right?

500 A. Yes, I did.

Q. What time was that, if you know?

A. Between 2:30 and 3 o'clock.

Q. What did you do then, Mr. Guido?

A. Then I recall going over to the West Division address, 5820 I believe it was, and we waited around for Fred Waddy and his men. It appeared to me that they had gotten lost somewhere along the line, so I got back into my car and drove up to Central Avenue, and Division looking for them and I finally found him.

It was then that I directed them to our house on West Division.

Q. What did you next do after you talked to Mr. Waddy?

A. Well, I directed the truck to around the rear, opened up the door, and stood around waiting for them to bring the furniture into the house. And as they brought one or two pieces in, I left the apartment on West Division.

Q. About what time was that?

A. Well, that could have been about 3:30 or somewhere around there.

Q. When you left the apartment at 3:30 or somewhere around there, where did you go?

501 A. I went back to the Kolin address. That was my wife's.

Q. For what purpose?

A. She had told me that morning—

Q. You are speaking now of your wife?

A. Yes.

She had told me that morning that my little daughter Corine, was running a fever. And I just went back there to check on that.

Q. How long did you remain there?

A. It could have been an hour or so or longer, because when I did get back to the West Division address the movers—

Q. Let me ask you this: After you got to the Kolin address, you returned to the West Division address?

A. I returned by cab, not by car.

Q. Where did you leave your car?

A. Well, when I left the Kolin address, I believe I turned left on Roosevelt Road down to Keeler, and then a right turn down Keeler. It was then that my car started acting up with a vapor lock. It was doing that all that week. I thought I was going to have another vapor lock and I pulled the car over to the curb at about Grenshaw and Keeler, I believe it was.

502 Q. And then you took a cab back to the Grenshaw address?

A. I then walked back to Roosevelt Road and went into one of the package goods stores there, I believe it was, and bought a pint of whiskey. I don't remember the name of that, and then I called a cab. I got into the cab and went back to the West Division Street address. I remember that Fred Waddy and the two movers were waiting there for me and the furniture was all in the apartment.

Q. What time did you arrive back at the 5800 West Division Street address?

A. I would say about 4:30.

503 Q. Who did you see at the West Division Street address when you arrived there?

A. Patricia Nugent, Fred Waddy, and his two men.

Q. What was done by you then?

A. I gave Fred Waddy the pint of whiskey and paid him, I think it was $45.00, or it could have been more money than that for moving me from Beacon to West Division.

Q. What happened next that day?

A. Then Fred and his boys left, and Pat and I waited around. We were expecting her mother and her sister. They arrived shortly afterwards. It could have been 5

o'clock or 5:30. I don't quite remember the exact time on that, but they did arrive. That is, Evelyn Binne and Corine Guzy, arrived.

Q. Did they bring anything with them?

A. Yes, sir, they brought soup and crackers.

504 Q. What was done by you or by Mrs. Guzy, Mrs. Binnie or Mrs. Nugent thereafter?

A. Well, Corine Guzy is a younger girl and she likes movies, and in the apartment looking directly across is a movie, the Roxy Theatre by name, and the picture that was playing was "To Catch a Thief," starring Grace Kelly, and she suggested that we see that movie, because when the movers had moved in the furniture they had moved it in position that evidently Patricia Nugent had directed them to move it. There wasn't really too much to do at the time. She suggested going to the show and we all left. I wrote a note for Joe and pinned it on the door, or between the door.

Q. Did you then go to the motion picture?

A. Yes, sir.

Q. The four of you?

A. Yes, sir.

Q. How long did you remain at that motion picture?

A. I don't know. I could have got out of there at 8:30, 9:00 o'clock or 9:30. I don't remember.

Q. To your best estimate, what time did you enter the motion picture, as you now recall it?

A. Well, it could have been—it had to be before
505 six o'clock, I am pretty sure of that, Because Fred Waddy told me he left at approximately 4:30. And we sat around and had soup, and they didn't stay around very long. So, I know it couldn't have taken longer than an hour and a half. It could have been 5:30, 6:00 o'clock, or it could have been 6:30.

Q. Did you remain in the motion picture throughout that entire period of time?

A. Yes, sir, I did.

Q. After you left the motion picture, what did you do?

A. Well, the four of us left. That is, Evelyn Binnie, Corine Guzy, myself, and Patricia Nugent left the movie. Evelyn Binnie and Corine Guzy left, got in their car and went back to their address, which was on Neva, 3920 North Neva. And I and Patricia Nugent, I believe I walked Patricia Nugent upstairs and left. I don't know if I went into the apartment. I don't recall that, but I do know I left, because I told Patricia Nugent I was going back after my car.

Q. About what time was that?

A. It could have been between nine and maybe
506 ten o'clock, or it could have even been at eight-thirty.

Q. Did you thereafter pick up your automobile?

A. Yes, sir, I did.

Q. I show you this pass book which has been marked as Defendant's Exhibit for identification, and ask you if this is the pass book for your account then existing in the Sears Community State Bank? Will you look at it?

A. Yes, that is my signature.

Q. I ask you to look at those items of deposit and withdrawal, and I will ask you whether they correctly reflect the amount of the deposits and withdrawals in that account?

A. Well, I know that 4,000 was deposited in there, and as to this, if these figures amount to 4,000, I would rather believe that they do.

Q. And those dates are the dates of deposits and withdrawals, is that so?

A. Yes, sir.

Q. You have now told us all you can recall concerning

your movements and activities on the 4th day of November, 1955?

A. No. I recall also getting the automobile back
507 away from Grenshaw. It could have been at Grenshaw and Keeler, and driving back to the apartment on West Division, going upstairs, and Patricia and I, I recall, buying pizza and we drove over, or either walked over and bought a pizza, and we stopped at the corner where we lived, and at a liquor store we bought a bottle of wine and we went upstairs and had that.

Q. You didn't go out again that day, is that so? You remained in the apartment the balance of the day, is that so?

A. Yes, sir, I did.

Q. I show you five $2 bills, which have been marked and received in evidence as being Government's Exhibits 5, 6, 7, 8 and 9, and I will ask you whether or not you have ever seen these bills before, and if you are able to advise us?

A. I am not able to tell you whether I ever seen those bills before. Although, I will say that I have had $2 bills, but I can't identify those bills at all.

Q. Let me ask you this, did you ever have any transactions at Sears Roebuck and Company concerning the buying, I think, of a sweater or some lingerie; the
508 work being done on your car in the service station, and the purchase of any candy in which $2 bills were used?

A. As far as the candy is concerned, I don't know. But I do recollect buying something in the lingerie department, and also having my car serviced.

Q. And using $2 bills in payment of those items?

A. That I can't honestly say that I used $2 bills or fives or tens. I don't remember.

Q. Did you in the month of January, 1956, have any $2 bills that you recall, a number of $2 bills?

A. In January of 1956?

Q. Yes? That you had a number of $2 bills in your possession of that money?

A. Yes, sir, I did.

Q. Are you able to state from whom you received those bills?

A. Yes, sir, I do. I can.

Q. From whom did you receive those bills?

A. I received those bills, I would say, approximately ten to fifteen of them, I don't remember exactly, but I received those bills from a fellow, a friend of miney that I have known for fifteen years by the name of James
509 de Angelo.

Q. Will you tell us of the circumstances whereby you were paid this money by James de Angelo?

A. He paid me this money that he owed me through a gambling debt in November. In the middle part of November sometime.

Q. Of what year?

A. Of 1955.

Q. Now, you state it was paid in payment of a gambling debt?

A. Yes.

Q. I would like to have you tell the court and jury as to when and how that debt was contracted? How did he happen to owe you this money?

A. Well, we had a seven card called rummy game at the North Beacon address.

Q. When?

A. This was sometime in October, 1955.

Q. Do you know when in October?

A. I don't know, but we discussed it. That is, Patricia and I, and someone else, and to the best of my recollection it had to be sometime in October, in the middle or maybe later in October. Late in October.

510 Q. Who was present at the time of this card game?

A. Myself, Patricia Nugent, Jimmie de Angelo, Dutch. I understand through my wife that his name could have been Pinagilla, or Pinagrella, or something. I don't know the last name. I know him by "Dutch."

Q. Who else was present, if anybody?

A. Well, there was Patricia Nugent, myself, Jimmie Rotschford—did I say Dutch?

Q. Yes?

A. Dutch, and Jimmie de Angelo.

Q. Did you win any money from the participants in that game on that day?

A. Will you repeat that?

Q. Did you win any money from the other people who were playing on that occasion?

A. Yes, sir.

Q. How much did you win?

A. I won close to a thousand dollars, and five hundred dollars on paper.

Q. From whom did you win this money? From which of the other participants in the game, that you are able to tell us?

511 A. Well, I won close to $50 from—I don't know if I won it all from him, or if he lost it on the table, but eventually he lost his money. That was Rotschford. He lost everything he had, and I understand he lost about forty or fifty dollars. And Jimmie de Angelo was the big loser. And Dutch also lost some money.

Q. How much currency did you win from Jimmie de Angelo that time?

A. Well, all in all I won close to a thousand dollars.

Q. In currency?

A. Yes. I won't say I won it all from Jimmie de Angelo. He could have taken some of it from Dutch or

the other fellow. But I eventually wound up with most of it, plus five hundred dollars on paper.

Q. When you say five hundred dollars on paper, I would like to have you tell us what you mean?

A. Well, it is customary amongst gamblers when a fellow loses a lot of money you either borrow him something or he will play on I.O.U.'s.

Q. On paper you mean you had something due for five hundred dollars?

512 A. Yes, sir.

Q. And whose I.O.U. was that?

A. Well, he didn't exactly give me an I.O.U. I mean, it was suggested that he owed me the money but he didn't hand me a slip or anything like that. We just kept track of the amount of money that he lost on a piece of paper, and it amounted to five hundred dollars.

Q. When you say he, you mean who?

A. James de Angelo.

Q. Did he give you any currency at that time in October, 1955?

A. Did he give me any currency?

Q. Yes, then? That night?

A. He didn't give me any, I won it from him.

Q. Did you receive any currency from him?

A. Yes, sir.

Q. Did you win any cash from him?

A. Yes, sir, I did. I won approximately a thousand dollars from the three of them.

Q. Were you thereafter paid the debt of five hundred dollars which was contracted that night?

A. Was I what?

Q. Were you thereafter paid this five hundred dol-

513 lars by Jimmie de Angelo that he owed you on paper?

A. Yes, sir, he paid me later.

Q. And when did he pay you?

A. He paid me, oh, I would say about a week. It could have been ten days or possibly two weeks following our moving from North Beacon.

Q. What day, again, was that?

A. I don't know the date, sir.

Q. But the date of your move from the North Beacon address was November 4th?

A. Yes. He probably paid me a week or ten days after that.

Q. Where was that payment made?

A. That payment was made at a refreshment stand, at the hot dog refreshment stand on Wilson Avenue and Marine Drive.

Q. How much money was paid to you at that time? By Mr. de Angelo?

A. At that time Jimmie de Angelo paid me—when he did pay me—he paid me,—he gave me a thousand dollars. However, we are getting away from the subject. I gambled with him on another occasion.

514 Q. I understand that.

But he gave you one thousand dollars at this hot dog stand on Wilson Avenue and Marine Drive?

A. Yes, sir.

Q. Whose place is that?

A. John Chickahanas, and the fellow that operates the Long Beach Cab System. Longbeach 1-1114.

Q. Now, why was it he paid you one thousand dollars when he only owed you so far about—an I.O.U. for five hundred dollars?

A. We had another game.

Q. When was that?

A. That was—I would say one or two days following the first game.

Q. Where was that?

A. At the same place.

Q. Who was present at that time?

A. I, Jimmie de Angelo and Patricia Nugent.

Q. Who participated in the game?

A. Myself, and Jimmie de Angelo.

Q. What was the result of the game?

A. I won about $175 off of him in cash, plus an-
515 other $500 which was the limit I would let him go on paper.

Q. In other words, the total debt which was created by the two card games was $1,000, is that right?

A. The debt was $1,000, yes, sir.

Q. When he paid you around the 15th of November do you recall in what form you received that money?

A. Well, there was—there were denominations. There were big ones, and there could have been, maybe, ten 50's, a couple hundreds, and there were fives, tens, and what struck me most was the $2 bills.

Q. Do you know what was done with those $2 bills by you? Do you recall what you did with those $2 bills?

A. Well, when I received them they—

Q. Well, did you spend those $2 bills?

A. I don't have them any more. So, I evidently did spend them, yes, sir.

Q. How frequently did you see during this period of time James de Angelo?

A. During what period of time?

516 Q. During the period of time of October, November and December, 1955.

A. I saw him—well, I have known de Angelo for about fifteen or twenty years now, and in those particular months that you refer to I had seen him on several occasions at the Kolan address in the company of my wife, and throughout the entire year.

Q. Do you know his address?

A. Sir?

Q. Do you know what his address is?

A. Well, he has been moving.

You mean, now? I know his wife's address, but I don't know his address.

Q. And what is his wife's address?

A. She lives in the vicinity of Archer Avenue and Crawford. I have been up there talking to her on many occasions in regard to her husband.

Q. Do you know her phone number?

A. Yes, sir, I do.

Q. What is that phone number, if you know?

A. I have it here in my book.

(Whereupon the witness looked at a book.)

It is Reliance 5-6046.

517 Q. How frequently would you see Mr. de Angelo at the Kolan address?

A. I would say about twice a month. Sometimes I could have seen him twice in one month, and other times maybe not at all.

Q. By the Kolan address, that was your wife's address, is that so?

A. Yes, sir.

Q. When did you wife move from the Kolin address?

A. To the Oak Park address, 1110 South Austin?

Q. To 1110 South Austin Boulevard, yes?

A. She moved to the Austin Boulevard address, I believe it was in the middle of November, 1955, if I am not mistaken on that. I am pretty sure that is the time she moved.

Q. Did you ever see Mr. de Angelo at the Austin Avenue address?

A. Yes, I did.

Q. On how many occasions?

A. I saw de Angelo once, and Dutch twice.

Q. At the Austin Avenue address?

A. Yes, sir. That is in Oak Park, the Austin address, yes, sir.

518 Q. When was the last time you saw or talked to Mr. de Angelo?

A. I talked to Mr. de Angelo about two and one-half or three months ago.

Q. Until that time had you seen him quite frequently?

A. Yes, sir, most frequently.

Q. Going back to November 4, 1955, at any time during that day did you have an occasion to be in the vicinity of the Maywood-Proviso State Bank?

A. On what date, sir?

Q. On November 4, 1955, the day of the robbery?

A. Well, I will tell you, I didn't even know where the bank existed until the president gave it. I knew the bank existed but I didn't know the street. No, sir, I will say no to that question.

Q. Did you in any way participate in the robbery of that bank that has been testified about?

A. I certainly did not.

Mr. Green: That is all.

519 *Cross Examination by Mr. McGarr.*

Q. Referring to November 4, 1955, I believe you testified, Mr. Guido, that you woke up that morning at the Beacon Street address, is that right?

By the Witness:

A. To my recollection, yes, sir.

Q. In other words, you had slept there the night before?

A. I slept there all the time.

Q. Yes?

A. That I lived there.

Q. Was that your residence at that time, the Beacon Street address?

A. Yes, sir, it was.

Q. As I recall, you lived there with—

A. Patricia Nugent.

Q. Calling your attention to November 5th, do you recall having any conversation with a man who identified himself as an FBI Agent Norton on the Division Street address in question?

A. I do. I don't remember the name of the Agent but I do recall being talked to.

520 Q. Didn't you tell Agent Norton on that occasion that you had spent the night of November 3d and November 4th, the morning of November 4th, with your wife Grace in the Town Hotel in Cicero?

A. No, I certainly did not. It is not true. I haven't been with my wife for four years now.

Q. You mean you haven't lived with her?

A. I haven't slept with my wife for four years. Let us put it that way, and I haven't lived with my wife for four years. I have substantial proof of that. I see her because of the children.

Q. You see her frequently, do you not?

A. I wouldn't say frequently, no. I go there to give her money for the house, and also to pay bills for the children and the groceries.

Q. Did you and your wife Grace open a bank account at the Sears Bank on September 28, 1955?

A. Yes, sir, we did.

Q. At that time?

A. On September 28, 1955?

Q. Yes?

A. Yes, we did.

Q. At that time, you had been estranged from her
521 for two years, or at least three, years, isn't that right?

A. If it figures that way, yes, sir.

Q. And at that time there was a deposit of $4,000, is that correct?

A. Yes, sir.

Q. And the contract specified that there could be no withdrawals unless both of you signed?

A. Yes, sir.

Q. Was that your money or Grace's money you had deposited there?

A. That was Grace's money.

Q. What was the purpose of that deposit?

A. What was the purpose of the deposit?

Q. Yes?

A. Well, what is the purpose of any deposit?

Q. Why did you arrange a joint account with a wife from whom you were estranged?

A. Well, the money that she deposited in that bank happened to be her actual money. And the reason we are estranged is because we have had trouble with the family, outside influences, and I talked my wife into having me sign that piece of paper along with her so that no one
522 else could put claim to the money, because we had an agreement that whatever at the time we had in the bank was going toward the kids some way or another.

Q. That was her money then that was deposited on this occasion, is that right?

A. Yes, sir.

Q. Is it true that $1200 of the $4,000 was withdrawn on October 24th, 1955, one month later?

A. October 24, 1955?

Q. Yes. One month, approximately, after the initial deposit?

A. That is possible. I don't remember.

Q. You would have had to sign it in order to make that withdrawal, would you not?

A. Yes, sir, I would have.

Q. Do you recall doing so?

A. What is the date on that again, October what?

Q. October 24, 1955?

A. Yes, sir. I am pretty sure of that. I won't dispute it.

Q. Do you know what was done with that $1200?

A. I am not certain, but I think the reason we drew that, withdrew that money was that I intended at the
523 time to go in business with John Chickatanas at Marine Drive and Wilson Avenue, and I have a slip here where I gave John Chickatanas $950 of that money.

Q. So, you withdrew $1800 of that money that your wife Grace had deposited for the benefit of the children, in order to go in business with John Chickatanas?

A. No, not $1800.

The Court: It was $1200.

Mr. McGarr: I am sorry, $1200.

By the Witness:

A. I believe that was the reason for it. I won't say for certain on that.

By Mr. McGarr:

Q. Calling your attention to November 4, 1955, just eight days after the $1200 was withdrawn, do you recall a withdrawal of $1800?

By the Witness:

A. Yes, I do.

Q. Do you recall the purpose of that withdrawal? Who got that particular sum?

A. The particular sum was paid out to fellows that I owed money to. Some people that I had borrowed
524 money from. Part of it was given to my wife.

Q. How much, do you recall?

A. I don't recall but it was, I would say, maybe four or five hundred dollars because I knew she was planning on moving to a better neighborhood, better than the one in which she was living, and I needed money for the moving

from Beacon, plus the fact that I owed a few bucks here and there to different people that I borrowed from.

Q. You owed money, you say, to different people?

A. Yes, sir.

Q. Wasn't this the period you testified to that you were winning so much money in gambling?

A. Yes, but I wasn't collecting anything.

Q. You mean, you were winning on paper? Didn't you testify you collected $1,000 in a short time from a man by the name of de Angelo in gambling?

A. At this time you are talking about?

Q. Yes?

A. Are we talking about the same time in October?

Q. We are talking about November 4th, 1944?

A. I didn't collect any money from Jimmie de Angelo until the middle of November.

525 Q. Prior to November 4th had you not won a considerable sum of money from de Angelo?

A. Prior to November 4th, yes, I did.

Q. That was sometime in October?

A. Yes, sir.

Q. Yet on this occasion you withdrew $1800 of Grace's money to pay a debt, is that correct?

A. Yes, sir.

Q. Calling your attention to November 28th, which is 24 days after the withdrawal we are talking about—

A. November 28th?

Q. Yes?

A. Yes.

Q. I note there is a withdrawal of $600. Do you recall that?

A. November 28th? I don't recall really that. If I did draw any money, I can't remember or tell you what I did with it or not, because I had money I passed it out left and right. I can't remember just everything.

Q. Calling your attention to January 30, 1956, I notice the account is closed with a withdrawal of $401.50. Is that right?

526 A. Yes, I remember that withdrawal pretty clearly.

Q. Do you recall who got that money?

A. I believe that money went toward my defense in this trial here.

Q. You said earlier, if I recall, you and Grace opened this joint account, although she was estranged from you, and you deposited $4,000 of her money for the benefit of her and the children?

A. Yes.

Q. During the course of the life of that account from September 28, 1955, to January 30, 1956, did Grace or the children get any of this money?

A. Yes, they did.

Q. How much?

A. I don't know exactly how much they got, but any time we withdrew it was either that we split it between us, or that I took the greater share and gambled it away.

Q. The original $4,000 deposit was Grace's money, was it not?

A. Oh, yes. I had given it to her.

Q. You said on your direct examination that you

527 had been convicted on two occasions, is that correct?

A. Yes, sir.

Q. Calling your attention to December 29, 1937, were you not convicted on that date?

A. I don't know, sir.

Q. Do you recall being—

A. (Continuing) What year was that, sir?

Q. December 29, 1937?

A. 1937?

Q. Yes?

A. What is it, a felony?

Q. Do you recall being convicted on that day for larceny for a purchase from Mathew Winsky and being sentenced to one to ten years?

A. I remember Mathew Winsky very well because he later entered the penitentiary with me.

Q. Calling your attention to March 2, 1944, do you recall being convicted on that day for larceny for a purchase from Frank Musso with a sentence of ten years being imposed?

A. Vaguely, yes, sir. I don't know the names, but I do know I was convicted.

Q. Calling your attention to March 2, 1944, do 528 you recall being convicted on that day for larceny for a purchase from the person of Nicholas Hurtz and sentenced to ten years concurrent with a previous sentence?

A. I don't recollect the names, but I do know the sentence is correct.

Q. Calling your attention to the same day, March 2, 1944, do you recall being convicted of larceny for a purchase from the person of E. Sunshine and sentenced to ten years with concurrent sentence?

A. I believe there were five ten-year sentences at the time. The names I don't know.

Q. Were they all the same date?

A. I don't know, sir.

Q. On the day of November 4, 1955, concerning which date you testified, what kind of a car did you say you were driving that day?

A. On November 4, 1955?

Q. Yes?

A. I was driving the 1955 Cadillac.

Q. What color was it, if you know?

A. Black.

Q. Do you remember the license number?

529 A. No, sir.

Q. What is your business or occupation?

A. Well, I am a gambler.

Q. On November 4, 1955, what was your business or occupation?

A. I am a gambler.

Q. You testified, I believe, that your friends Waddy arrived with his truck to move you from the Beacon Street address at about one o'clock on November 4, 1955, is that correct?

A. Yes, I believe I did.

Q. And that you and he left the apartment at about two-thirty or three o'clock, is that correct?

A. That is right.

Q. I assume the intervening time was spent loading the truck, is that right?

A. And also for arriving at the West Division address.

Q. I am talking about the time that you left the Beacon address?

A. I would say it took approximately forty-five minutes to move the stuff out of the apartment, including taking the wall-to-wall rug off of the floor and putting

530 that on the truck.

Q. And about what time did the truck depart from the Beacon Street address?

A. It could have been anywheres from two to two-thirty, or possibly even a quarter of three.

Q. Then I believe you went to the real estate office?

A. Yes, sir, I did.

Q. About how long was that?

A. I would rather say that I went to the real estate—I am not certain about that, whether I went that afternoon or possibly I went in the morning, but I will just stick

along with the fact I went there in the afternoon.

Q. You went in the afternoon?

A. Yes.

Q. Did you go there before you went to the new apartment on Division Street?

A. I believe I did.

Q. And when you got to the new apartment on Division Street, as I understand it, Waddy and his truck had not yet arrived?

A. That is right.

Q. So you left and looked for them?

531 A. That is right.

Q. What time was it that you left the apartment looking for Waddy and his truck?

A. Well, there again, I am not certain about the time. It could have been three or three-thirty, or possibly just a little later than that.

Q. And after you left the apartment and found Waddy, did you come back and unload the truck?

A. Did I come back and unload the truck?

Q. Or help him unload the truck?

A. I didn't help him unload the truck on West Division, no, sir.

Q. You then went to see Grace, is that correct?

A. After they had brought several pieces of the furniture in the house, and I saw they were under way and didn't need any assistance, yes, I did go to the Kolin address.

Q. Well now, since you testified it may have been three-thirty or a quarter to four when Waddy arrived, what time then would you say it was when you left to go to visit Grace?

A. It could have been—when I left the West Division Street address it could have been three-thirty or a 532 quarter of four, or somewhere along in there.

Q. And you testified you spent an hour or more with Grace, as I recall?

A. To the best of my recollection, it could have been a half an hour.

Q. And as you left Grace's apartment and got into your car it broke down, isn't that correct, or you had trouble with it?

A. I was having trouble with the vapor with the automobile.

Q. How far did you drive after you left Grace's home or apartment before the car stopped?

A. About three and one-half blocks. Four blocks, or three and a half or four, or something like that.

Q. And you left it parked there?

A. At the curb, yes, sir.

Q. Did you try to seek the services of a mechanic?

A. Well, I knew from past experience with the vapor lock that all it needed was to cool off. The fuel pump, I believe. Either that or you could poor some water on it and cool it off and then it would start right away.

Q. These proceedings here took place on November 533 4th, 1955?

A. That is right.

Q. And then you hailed a cab, is that right?

A. No, that is incorrect. I called a cab.

Q. You called a cab?

A. Yes.

Q. From where did you make the call?

A. I made the call from one of the liquor stores. I don't know whether it was a liquor store exactly but they did sell liquor in there. It was on Roosevelt Road in between Kolin and I would say, Keeler, along in there somewhere.

Q. Where was it you left the car?

A. I left the car, I believe it was on—it could have been Grenshaw or Arthington and Keeler. It could have been one of those streets.

Q. And in what part of the city is that?

A. That is in Chicago.

Q. I mean what part, what area, the north side or west side, or what?

A. That is, oh, approximately a five- or seven-minute ride from one address to the other, from West Division to Kolin.

Q. Would you say that that was on the northwest
534 side?

A. No, I wouldn't. You mean the Kolin address?

Q. No, the place where you left your car?

A. I wouldn't call that the northwest side, no, sir. I would call that the—that was Roosevelt and Keller, I would call that the west side.

Q. Roosevelt and Keeler is the approximate location?

A. Yes, sir.

Q. Once again, do you recall the conversation on Division Street on November 5th with an Agent of the FBI? And do you recall that Agent asking you where you had left your car the night before?

A. No, I don't.

Q. Do you recall telling that Agent in response to that question that you had left the automobile parked at the intersection of Diversey and Sheridan Road in Chicago?

A. No, sir, I don't.

Q. You say that before you returned to the Division Street apartment you stopped at a liquor store, is that correct?

A. From Kolin? You are speaking about when I was over at Kolin?

535 Q. After the car broke down and you took the cab, then what did you do?

A. As I stated before, I got this pint of whiskey and made a telephone call, and we drove directly over to the West Division house.

Q. In the cab?

A. Yes, sir.

Q. At about what time did you arrive there?

A. Oh, I would say, four-thirty, a quarter of five, or possibly even five o'clock.

Q. You testified earlier you had left the apartment on Division Street at three-thirty or a quarter to four?

A. Well, I don't know exactly the hours. I can't be precise about that. I doubt if anyone can. This all happened about a year and a half ago.

Q. And then you went to visit Grace and your car broke down and you got a cab and stopped and bought the whiskey and made a phone call, and got a cab back to the Division Street address, at four-thirty or a quarter to five, is that right?

A. Would you repeat that?

536 Mr. McGarr: Will you read the question?

(Question read.)

By the Witness:

A. Yes, sir. I am not exactly sure on the time, though.

By Mr. McGarr:

Q. Did you have lunch anywhere in that period?

By the Witness:

A. Did I have what?

Q. Lunch that day?

A. Did I have lunch that day?

Q. Yes?

A. All I can recall having that day, unless I stopped along the way; unless I had something at the Beacon address, the only recollection of having eaten anything was soup that evening, the popcorn and candy, pizza and wine.

Q. When you arrived back at the Division Street apartment was Patricia Nugent there?

A. Yes, sir, she was.

Q. And Evelyn and Corine had arrived?

A. They arrived later.

Q. About what time do you recall they arrived?

A. I would say, anywhere between a quarter of
537 five or possibly later than that, five o'clock, or five-fifteen, or somewhere along in there.

Q. Then you had a meal with them, or soup, in any event, with them, is that right?

A. Yes, sir.

Q. Had the movers completed their job and left at this time?

A. They were long gone, yes.

Q. Where was the television set, if you recall?

A. In the front room in position, a little off, probably, but in position.

Q. Was it operating at any time while you were in the apartment?

A. No, sir, it was not.

Q. Did you have an inside aerial or an outside aerial?

A. I believe it has a combination of both, an inside and it could be used with an outside aerial.

Q. Do you know whether you could get a picture on it without an outside aerial?

A. Yes.

Q. Have you ever done so?

A. Yes, I have.

Q. What day of the week was it that all of this
538 occurred, if you recall?

A. What day of the week did all of what occur?

Q. Everything that you have just testified to?

A. On November 4th.

Q. What day of the week?

A. It was on a Friday.

Q. How are you able to recall that this particular moving day was a Friday?

A. Well, Jesus, there has been so much talk and discussion about it. I would be an idiot if I wouldn't even recall it. I was questioned about it the following day.

Q. By whom were you questioned?

A. I don't know the names of the two fellows. All I can remember—the only discussion that I remember between myself and the two Agents was that the discussion concerned, they were talking about somebody that robbed the bank, and the only thing I can recollect telling those two Agents was that as long as it was serious, a serious matter as this, you may as well know that my name is not Don Schiavone but that it is Nicholas Guido.

They went across the street and made a telephone 539 call and released me.

Q. Isn't it true that you told the Agents on that occasion that your name was Tony Guido, and that you were a bookie and you hadn't seen your brother Nicholas Guido until—

A. Until I confessed the truth, yes, sir. I believe I did. I don't know if I said Tony or what name I give them. I could have given them Greco. But I do remember definitely, as long as it was a serious offense I would tell them my right name, which I did.

Q. At the time these Agents were talking with you on Division Street—well, by the way, what time of the day was this?

A. I don't know, sir. It could have been in the morning. Or it could have been early in the afternoon. I don't quite remember.

Q. Do you know where Patricia Nugent was at that time?

A. Yes, I do.

Q. Where?

A. She was across the street in the restaurant.

Q. Do you know whether the Agents talked to her on that day?

540 A. I saw somebody talking to her, but I didn't know whether it was an Agent or not.

Q. After you had the soup and crackers, I understand your testimony to be that yon and Patricia Nugent, her sister Corine, and her mother, Evelyn—what was her last name?

A. Binnie, B-i-n-n-i-e.

Q. You went to the Roxy Theatre?

A. Yes, sir.

Q. About what time did you arrive at the Roxy Theatre?

A. I would say, between five and six.

Q. Do you recall what movie was playing?

A. Well, there has been quite a bit of discussion about the movie too. It was "To Catch a Thief," by Grace Kelly.

Q. Was there another feature?

A. There was another feature. I don't remember anything about the other feature, although I did inquire about it, and Patricia Nugent told me it was a movie regarding an insane asylum. Then I remembered vaguely seeing that picture also and one in connection with the asylum.

Q. When did you and Patricia Nugent discuss
541 what movies you saw on that day? When was the first time you and Patricia discussed it?

A. We discussed it the following day.

Q. On that occasion you could not remember anything about the movie you had seen the night before?

A. Oh, yes. I could remember I had seen "To Catch

a Thief." The movie was right in front of me. I was in the movie.

Q. How about the other one, you discussed it the next day and yet you were unable to remember the name of it or anything about it?

A. The only one that was of interest, and the only one that really interested us and attracted our attention was the "To Catch a Thief," by Grace Kelly.

Q. But you did see the other one, did you not?

A. I saw the other one.

Q. But you do not remember its name or the plot?

A. The plot of the picture with reference to the asylum?

Q. Yes?

A. I believe, as far as I can remember, and which is very little, Cary Grant played in that movie.

542 The Court: We will take a recess until two o'clock.

(Whereupon the further hearing in the above-entitled matter was continued until 2:00 o'clock p.m. of the same day.)

543

IN THE UNITED STATES DISTRICT COURT

* * (Caption--No. 56 CR 62) * *

Before Judge Igoe and a Jury,
Wednesday, May 1, 1957,
2:00 o'clock p. m.

Trial resumed pursuant to recess.

Present:

Same as before.

And thereupon the following further proceedings were had herein, in the presence and hearing of the jury:

544 The Clerk: United States v. Guido. Case on trial.

Mr. Green: At this time we would like to tender defendant's instructions A through P.

Mr. McGarr: And the Government tenders their instructions 1 through 11.

(Whereupon counsel exchanged instructions, and gave a copy to the court.)

The Court: You may proceed.

NICHOLAS GUIDO, defendant, called as the defendant in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Cross Examination (Continued) by Mr. McGarr.

Q. I believe when you left the stand this morning I was asking you whether on November 5th, a Saturday, you saw Patricia Nugent on that day?

By the Witness:

A. We were talking about the matter of the movie, I believe.

545 Q. Pardon me?

A. When we stopped, we were talking about the matter of the movie.

Q. We were talking about the matter of the movie?

A. Yes, sir.

Q. I will go back to November 5th. Did you see Patricia Nugent on that day?

A. Yes, I do.

Q. Do you recall you saw her being questioned by an FBI Agent?

Mr. Green: I am going to object to this unless there is something which occurred within his presence and not at some distant place, talking to someone else.

Mr. McGarr: If he could see her it would be taking place within his presence.

Mr. Green: As I recall his testimony this morning, he saw her across the street.

546 Mr. McGarr: I will withdraw the question.

(Question withdrawn.)

By Mr. McGarr:

Q. Did you not tell FBI Agent Norton when he talked to you that you had never seen Patricia Nugent before?

By the Witness:

A. I don't remember. When I was being questioned Patricia was not with me.

Q. Now, getting back to the movie, do you remember when you entered the theatre what movie was then playing? Was it "To Catch a Thief," or the other one?

A. I don't remember, sir.

Q. You don't know which one you saw first?

A. I don't remember if it was one or the other. I can't remember.

Q. Did you see both movies in their entirety?

A. That is something else I can't say for certain because I don't remember. I know this much, we didn't go into the movie as it just started. One picture was in progress already, but the other one, which one it was, I don't remember.

547 Q. Did you wait through that movie until you saw the beginning of it again, or reach the point where you saw it?

A. That is something else I can't remember.

Q. You testified, I believe, the four of you went to the movie together?

A. Yes, sir.

Q. Did the four of you sit together?

A. Yes, sir.

Q. Did you leave the other three at any time?

A. Did I leave what?

Q. Did you leave the other three at any time during the movie?

A. I believe I did once or twice.

Q. Where did you go?

A. I went to the candy counter, and probably to get some cokes or some soft drinks, if there was some. It is usually a habit of mine during the progress of a movie that I go and get a coke or a glass of water or something.

Q. During the course of your sitting watching the movie, did Patricia leave at any time?

A. Did Patricia leave the movie?

Q. Leave you?

548 A. Oh, leave me?

Q. Did she leave, to your knowledge?

A. That is something else I don't remember.

Q. You were sitting with her throughout the movie except when you left to get a coke, is that right?

A. Yes, sir.

Q. Do you recall while you were sitting with her she got up and left at any time?

A. I don't recall, but she may have.

Q. Might she have gotten up and left and been gone for a long period?

A. Never, no, sir.

Q. So that if she did leave, it was for just a brief period?

A. Just a brief period of time for a glass of water or something like that.

Q. Would it be possible that she got up and left at frequent intervals, let us say, every few minutes?

A. Every few minutes?

Q. Yes.

A. Not to my recollection.

Q. What day of the week, if you recall, was this
549 that you were in the theatre?

A. Friday evening, November 4th.

Q. After you left the theatre—and by the way, what time did you leave the theatre?

A. That is something I don't remember. It could have been upwards to nine-thirty, or possibly later, maybe a little earlier. I don't recall that.

Q. After you left the theatre, what did you do?

A. Patricia and I—I don't remember for sure whether I went up in the apartment with her, or I left her at the door. And then I went over to—well, in the meantime Evelyn Binnie and her daughter Corine Guzy left and went back to Neva, but I went over to Grenshaw, or Arthington and Keeler, and got my car.

Q. Was the car running at that time? Were you able to start it?

A. Yes, sir, I was.

Q. Did you have any further trouble with it?

A. With the car?

Q. Yes.

A. Yes, I did.

Q. That same night?

550 A. Yes, I did. It was either that night or—yes, sir, I think it was that night.

Q. Where did you say your wife was living at that particular time?

A. I don't know the correct address, but it was on Kol and 13th Street south.

Q. Did you visit or shop at the Sears Roebuck store at North and Harlem at any time in January?

A. I believe I did.

Q. I am speaking, of course, of 1956?

A. I believe I did.

Q. Do you recall what day of the week that was?

A. No, sir, I don't.

Q. Do you recall what you bought in that store on that occasion, if you know?

A. I believe I bought some underthings for Patricia Nugent.

Q. Would that be in the lingerie department?

A. Yes, sir.

Q. Would you be able to name the garment?

A. That, I don't know.

Q. Did you have your car fixed?

A. I don't know whether I had it fixed, or whether it was greased or oiled. I don't recall what it
551 was.

Q. On that occasion do you recall whether you had any $2 bills in your possession?

A. On that particular occasion I might have had $2 bills. I may have had it in my possession at that time.

Q. Do you think these might have been the $2 bills which you won from your friend, James de Angelo?

A. I understand they are.

Q. Why do you say you understand they are?

A. Because I was questioned by Agent Spencer following my arrest very extensively on the $2 bills.

Q. What leads you to believe the statement that you understand those are the bills you got from de Angelo?

A. Because they were the only $2 bills that I had.

Q. And how long prior to your spending these in the Sears store did you get them from de Angelo?

A. Oh, I would say about two months, probably.

Q. And you kept these $2 bills in your possession then for two months before you spent them?

552 A. Yes, I believe so. I may have spent a couple of them before that.

Q. Where was it you kept them?

A. I kept them in the apartment of my sister-in-law, Gloria P-e-t-r-i-e. I might be wrong on the spelling.

Q. Are you in the habit of keeping money in your sister-in-law's apartment?

A. Yes, sir, I am.

Q. How well do you know your sister-in-law; how often do you visit her?

A. How often do I visit her?

Q. Yes?

A. Up until the separation from my wife I was at her house constantly.

Q. Your sister-in-law, I assume, is your brother's wife?

A. She is my wife's sister.

Q. Your wife's sister?

A. Yes.

Q. You visited her constantly, and let you don't know how to spell her name, or how to pronounce it, is that correct?

A. Well, that is true.

Q. How much money did you keep at her apartment?

553 A. At what time, sir?

Mr. Green: I will ask that you specify a time.

By Mr. McGarr:

Q. In the period of around November, 1955, to January, 1956?

By The Witness:

A. Well, I remember giving her a great portion of the money that I won from de Angelo. Also, the money I had gotten from John Chickatanas, the thousand dollars which I borrowed him, and part of the money that I had won at various other places.

Q. You borrowed a thousand dollars from John Chickatanas?

A. I didn't borrow a thousand dollars. I will withdraw that. I loaned him $1,000 and then retrieved it about somewhere along in October. Late October or November.

Q. Wasn't that a note you showed me this morning from Chickatanas in the amount of $950?

A. That is right.

Q. Then why do you say the transaction involved $1,000?

554 A. Well, he owed me more money than that $950.

Q. Where in your sister-in-law's house, if you know, was this money kept?

A. In back of the refrigerator, in a steel box.

Q. Did anyone else have access to that box?

A. Her and her husband.

Q. How frequently did you have access to it, or go into that box?

A. I don't recall unless I could have went in there—I didn't go in there myself, but her husband he—whatever his name is, went in there on one or two occasions to get me a few bucks.

Q. He would get it for you?

A. Yes.

Q. In other words, your sister put the money in the box?

A. Yes.

Q. But he could get it out for you?

A. Yes.

Q. Did you visit that box, or did he get money for you out of the box on the day you went to Sears?

A. On the day I went to Sears, I believe I got
555 my money—I am not certain of that, but I believe I got that money from the Pioneer Bank on North Avenue and Crawford.

Q. The money you spent at Sears then you got out of the safety deposit box at the Pioneer Bank?

A. I won't say that for certain, but I believe I did.

Q. But you did go to the bank before visiting Sears?

A. I believe I did.

Q. Did you take money out of the savings box at the Pioneer Bank?

A. I believe I did take something out.

Q. Is that the box you had under the name of Don Schiavone?

A. Yes, sir.

Q. Did you take any $2 bills out of the box?

A. That is something I don't recall. I may have, but again, I may not.

Q. Do you know whether there were any $2 bills in the box?

A. I do know this much, I was holding onto those two bills until som[illegible]ne suggested—I had a couple
556 of them—that they brought bad luck. Then I was going to pass them along.

Q. Do you remember then wishing to get rid of these $2 bills and taking them out of the box and spending them on that day?

A. No, not for the reason that I was superstitious of them, but they were lingering there and I wanted to just spend the money as it came along.

Q. They were lingering where, in the safety deposit box?

A. I believe they were.

Q. Now, the money you got from de Angelo in return for this gambling debt, you said you put that in a box behind your sister-in-law' refrigerator?

A. No, I gave her the money on Kolin. I gave her two envelopes on Kolin at my wife's address.

Q. Your wife's address was on Kolin. Where was that address?

A. 13th and—the address I don't know. 13th and Kolin.

Q. Didn't you tell Agent Norton on the day he interviewed you on Division Street your wife lived in the 6000 block on South Drexel?

557 A. I may have told him that. I don't recollect it. The only thing I remember telling any of the Agents was when they told me about the fact they were looking for someone who had robbed a bank, I realized the seriousness of the situation and I immediately told them my correct name.

Q. After you had previously given them another name?

A. I may have, yes, sir.

Q. How often would you visit your wife's home when she lived on Kolin? How did you visit there?

A. Well, I would say on an average of maybe twice a week.

Q. Did you ever stay overnight there?

A. I don't believe I ever did, unless it might have been an occasion when one of the boys or one of the little girls was sick and I may have stayed there. I don't ever recollect sleeping there.

Q. Did you continue to visit your wife Grace? We are speaking of Grace now?

A. Yes.

Q. Did you continue to visit your wife Grace with the same frequency when she lived at 1110 South
558 Austin?

A. With the same frequency as at Kolin?

Q. As at Kolin?

A. I would say to that, that I can't say for certain whether I did or not.

Q. Was your wife, when she was living at 1110 South Austin, living alone with the children, or someone else living there with them?

A. She was living alone but she was planning on having her uncle live with her, and her mother.

Q. What was the purpose of your visit to your wife's at 1110 South Austin on the day you were arrested there?

A. We had had an argument over money several days before that visit, and she wanted several hundred dollars from me. And the reason I went there was to give her approximately $75.

Q. Did you have that much with you?

A. I understand that I had about $90.

Q. Where was that carried, if you remember?

A. I don't know. I don't know if I had it in my suit, or if I had it in my pants pocket, the coat, or where I had it.

Q. What is the first name of this de Angelo?

559 A. James.

Q. Where does he live?

A. He lives in the vicinity of—he doesn't live there now, but he did live there in that apartment three months ago in the vicinity of Archer and—as far as I know. I know his wife is stationed there—and Crawford.

Q. On the occasion when you won this money from him, I understand that was in a card game at your home, is that correct?

A. Yes, sir.

Q. Was de Angelo a guest in your home at that time?

A. At that time he was, yes, sir.

Q. How frequently had he been a guest in your home prior to that?

A. He was more frequently a guest at my wife's place than he was at the address on Beacon Street.

Q. How about Dutch, was he a guest in your home on the day you won $50 from him?

A. The day I won how much, sir?

Q. I think you said you won $50?

A. No, I didn't say that.

Q. How much did you win?

560 A. James Rochford was the one who lost forty or fifty dollars.

Q. How much did Dutch lose?

A. I don't know. It could have been close to a couple hundred dollars.

Q. Was he a guest in your home on the occasion of that game?

A. Dutch?

Q. Yes?

A. Yes, sir.

Q. Had he been a guest in your home previously?

A. He wasn't a guest in the home then, but previously I had seen him once, I believe, on Kolin, and several times on Austin.

Q. Yet, you don't know his name?

A. No, sir, I don't.

Q. You only know him as Dutch, is that right?

A. Yes, sir.

Q. Do you know where he lives?

A. Where Dutch lives?

A. Yes.

A. No, sir, I don't.

Q. Do you know anything about what type of work he does?

561 A. He is a gambler, as far as I know.

Q. You said that after this first card game which you have described there was a second card game at the Beacon Street address about two or three days later and you won more money, is that right?

A. That is right.

Q. And only two persons played?

A. That is right, de Angelo and myself.

Q. What type of a game was that?

A. We played seven-card rummy, 2, 4 and 6, and I believe we wound up playing 4, 8 and 12, and we were playing 10, maybe 20 dollars on high spades.

Q. Have you tried to contact de Angelo recently?

A. I have tried to contact de Angelo practically four or five times a week.

Q. In the recent past, is that right?

A. Yes, sir.

Q. You have been unable to do so?

A. Yes, sir. I haven't been unable to contact his wife, however. I had several meetings with her. And I have been calling her on the telephone very frequently.

562 Q. When you were asked by Mr. Green about the Maywood Bank you made the following statement: "I didn't know the bank existed until the president—" and then you stopped.

What was the meaning of that statement?

A. As I recall it, it was either the president or someone else who gave the address of that particular bank in Maywood.

Q. Do you mean on the witness stand?

A. I believe it was.

Q. And you did not know of the existence or the location of that bank until you heard it here?

A. I knew of its existence, but I did not know where it was situated. I know that there is one somewhere in Berwyn on Lake Street.

Mr. McGarr: No further questions.

The Court: Any redirect?

Mr. Green: There is, your Honor.

The Court: Proceed.

563 *Redirect Examination by Mr. Green.*

Q. I think Mr. McGarr asked you on cross examination this morning about the $4,000 with which the account in the Sears Community Bank was opened. Where was that $4,000 obtained?

A. From I. J. Tyson Building Contractor, Broadview, Illinois.

Q. For what was that obtained?

A. For the sale of a home. Of an uncompleted home; an unfinished home.

Q. Whose home was that?

A. Well, actually it was mine, but we had it in both my wife's name and myself for the purpose of the children.

Q. Now, referring to James de Angelo, did you see him frequently after the time of the arrest in this case?

A. Yes, sir, I did, up until about three months ago.

Q. How frequently did you see him?

A. Well, there was some weeks I would see him every night.

Q. Have you discussed this case with him?

564 A. Oh, yes, sir, very thoroughly.

Q. You knew of these $2 bills, didn't you?

A. Yes, sir.

Q. Did you ever discuss these $2 bills with Mr. de Angelo?

A. Yes, sir, I did.

Q. What did Mr. de Angelo advise you about it?

A. He advised me shortly after my arrest that there was nothing to the $2 bills. I told him that I was arrested and charged with this charge, and he pacified me by telling me that he would go to Calumet City where he got the bills, and he would talk to the people he got them from.

Then on many occasions he would tell me not to worry, that when the time came he would be present to testify in my behalf.

He also asked me not to mention it to anybody that the people in Calumet City wouldn't approve of it.

Q. By the people in Calumet City, whom do you mean?

A. The people that he gambled frequently with in Calumet City.

Mr. Green: I think that is all.

565 *Recross Examination by Mr. McGarr.*

Q. Mr. Guido, this $4,000 that you got from the I. J. Tyson, do I understand that was from the sale of an uncompleted home which was owned in joint tenancy by you and Grace, your wife?

By The Witness:

A. I believe it was owned in joint tenancy.

Q. When did you contract for the erection of that home? Do you remember?

A. Right after I got back from Las Vegas, Nevada.

Q. When was that?

A. That was, oh, it could have been, I would say, about four years ago, probably. I haven't thought much about it but it could be in that vicinity.

Q. Were you and your wife Grace living together at that time?

A. At that time?

Q. Yes?

A. Well, I believe it was around the time we began to have a little trouble, my wife and I. I would have to examine my memory on that, I am not certain on that point.

566 Q. But in any event sometime in 1955 you and your wife Grace made a joint deposit of $4,000 from the proceeds of the sale of an uncompleted home, although you were estranged at that time, is that right?

A. We were estranged, but as far as money matters were concerned, we were very friendly.

Q. How long had this home been under construction at that time?

A. Well, I think it took a year and a half to get it where it was, and it was almost completed except for the plumbing and the inside work. I think it stood up for sale for a great number of months.

Mr. McGarr: Nothing further. That is all.

Just a minute.

By Mr. McGarr:

Q. When your wife lived at the Kolin Street address, how frequently did you see de Angelo there?

A. I saw him at the Kolin address, I would say, about an average of twice a month.

Q. You mean on two occasions a month you would 567 go there and he would be there, is that right?

A. I could mean it that way, or you could look at it in another way. Maybe some months I wouldn't see him at all, and in another month I would see him more frequently, twice a month.

Q. And after your wife moved to 1110 South Austin, how frequently did you visit her there?

A. Well, I am really not certain on this because I believe I left on a vacation trip with Patricia Nugent. I don't recall if I went there too many times, but I do know I got the kids a Christmas treet, and I did go there and pay for the bills and groceries, but I never slept there at any time.

Q. Did your wife ever live, that is, Grace we are speaking of, ever live at 1600 South Drexel or anywhere on Drexel?

A. Would you repeat that?

Q. Did your wife Grace ever live at 1600 South Drexel, or any address on South Drexel?

A. 1600 South Drexel?
Q. Yes?
A. Not unless she lived there while I was away.
Mr. McGarr: That will be all.
568 Mr. Green: That is all.
The Witness: The witness is excused.
(Witness excused.)

Mr. Gorman: We will call Mr. Waddy.
The Clerk: Will you raise your right hand and be sworn, please.
Mr. Waddy: Yes, sir.
(Witness duly sworn.)

FRED WADDY, called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Gorman.

Q. Will you state your name, please?
By The Witness:
A. Fred Waddy.
Q. Will you spell that last name for the reporter, please?
A. W-a-d-d-y.
Q. Where do you live, Mr. Waddy?
A. At 3215 West 19th.
Q. What is your business?
569 A. Trucking.
Q. What kind of trucking do you do?
A. I am in the lumber business, and also do moving and express.
Q. Do you know the defendant in this case, Nicholas Guido?
A. Yes.

Q. Do you see him in the court room?

A. Yes, sir, over there (indicating).

Mr. Gorman: Indicating for the purpose of the record the defendant Nicholas Guido.

By Mr. Gorman:

Q. How long have you known the defendant Nicholas Guido?

By The Witness:

A. Quite a while.

Q. By quite a while, how long do you estimate?

A. About twenty or twenty-five years.

Q. Now, calling your attention to the early part of November, 1955, did you have an occasion to see the defendant Nicholas Guido?

A. Yes, sir.

Q. Did you have an occasion to do any business 570 with him at that time?

A. Yes, sir.

Q. What was it that you did for him?

A. Moving.

Q. Can you tell us how it was you happened to do moving for Mr. Guido?

A. He called me home the day before he wanted to move and asked me if I could get the truck, and I told him, yes. That is, for the next day. He wanted the truck that morning, but he couldn't get it that morning.

Q. He called your home the day before and told you he wanted to move?

A. Yes.

Q. Do you recall about when that was?

A. It was in the morning. I would say round nine o'clock in the morning.

Q. I believe you testified that was early in November, 1955?

A. Yes, sir.

Q. Now, on the next day did you hear from him?

A. Yes, sir.

Q. About what time was that?

A. It was about around the same time.

571 Q. Did you have a conversation with him at that time about moving?

A. Yes, I did.

Q. What did you tell him?

A. He wanted to move that morning, but the truck was busy that morning.

I asked him if it was all right to move him that afternoon.

And he said it was O. K.

Q. Did he tell you where he was living at that time?

A. That is right. I took the address.

Q. I beg your pardon?

A. I took the address down, yes, sir.

Q. Do you recall that address now?

A. Not at the present time, no.

Q. Do you recall on what street that was?

A. On Beacon.

Q. Did you subsequently go up to the Beacon Street address?

A. Yes, sir.

Q. About what time was it you arrived there?

A. I would say around one o'clock.

Q. Was there anyone with you at that time?

572 A. Yes, sir.

Q. Who was with you?

A. My nephew, Maurice.

Q. Was anyone else with you?

A. Yes, sir, George.

Q. When you arrived at the Beacon Street address, what did you do, if anything?

A. I went in to see what he had to move.

Q. When you say you went in to see what he had to move, did you go into the apartment that he was living in?

A. Yes, sir, into the apartment.

Q. Who did you see when you got there?

A. I saw a lady there, and he was there.

Q. Did you have a conversation with him at that time?

A. Yes, sir.

Q. What if anything happened after that conversation?

A. I gave him the price of what I would charge him to move it.

And he said, "O. K., go ahead."

Q. Did you move him out of that apartment?

A. Yes, sir.

573 Q. About what time was it, would you say, that you finished loading your truck?

A. A little after two.

Q. Then what did you do?

A. I started off to the other address on Division where he moved.

Q. Do you recall what address that was on Division Street that you were going to?

A. No, I don't.

Q. Did you finally get to the address on Division Street?

A. Yes, sir.

Q. At about what time was it, if you recall, you arrived at the Division Street address?

A. I would say it was about three o'clock.

Q. What did you do when you arrived there?

A. Well, I stopped in the front first to see which was the best way to carry the furniture up. The front was no good so I went to the back, around the alleyway.

Q. What did you do after you went around to the alley?

A. I went upstairs and looked things over, and started carrying the furniture up there.

574 Q. Did you see the defendant at that time?

A. Yes, sir, he was there.

Q. Where did you see him?

A. At his apartment on Division.

Q. Was there anyone else there with him?

A. Yes, sir, a lady.

Q. Did you start to move the furniture in?

A. Yes, sir.

Q. Was the defendant there all the time that you moved the furniture in?

A. No, sir, he wasn't.

Q. Can you tell us about when it was he left?

A. Oh, I would say about twenty or twenty-five minutes.

Q. You mean by that after you started moving the furniture in?

A. Yes, sir.

Q. How long did it take you, if you recall, to move the furniture into that apartment?

A. It was a little after four o'clock. Four-thirty, I would say.

Q. Was the defendant there when you finished moving the furniture in?

A. No, sir, he wasn't.

575 Q. What did you do then?

A. I had to wait. I had to get paid for the job.

Q. About how long did you wait?

A. It was about a quarter to five before I got out of there.

Q. Was the defendant there at that time?

A. That was when he came in.

Q. What happened when the defendant came in?

A. He paid me.

Q. How much did he pay you?

A. $45.

Q. Was there anything else exchanged at that time?

A. Yes, sir, he also gave me a bottle for Thanksgiving.

Q. What did you do then?

A. I took off and went home. That was the finish.

Mr. Gorman: That is all.

Mr. McGarr: No cross examination.

The Court: That is all, Mr. Waddy.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Green: We will call Mr. Rochford.

576 The Clerk: Will you raise your right hand and be sworn.

Mr. Rochford: Yes.

(Witness duly sworn.)

JAMES ROCHFORD, called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Green.

Q. Will you state your name, please?

By The Witness:

A. James Rochford.

Q. Will you spell your last name?

A. Rochford, R-o-c-h-f-o-r-d.

Q. Mr. Rochford, I want you to talk loud enough so we can hear you back here?

A. Yes, sir.

Q. Where do you live?

A. 4626 North Magnolia.

Q. What is your business or occupation at this time?

577 A. I am a vendor at this time.

Q. Do you know the defendant in this case, Mr. Nicholas Guido?

A. Yes, sir, I do.

Q. For how long have you known him?

A. For four years.

Q. Now, did you know him during the months of November and October, 1955?

A. Yes, sir, I did.

Q. During the months of October and November, 1955, did you have an occasion to see him frequently?

A. Yes, sir, I did.

Q. Where were you living at that time?

A. At 853 Montrose.

Q. And where was the defendant Guido at that time residing?

A. At 4446 North Beacon.

Q. Directing your attention to sometime toward the middle of the month of October, 1955, did you participate in a card game at the residence of the defendant Nicholas Guido?

A. Yes, I did.

Q. When was that, the best you can tell us, Mr.

578 Rochford?

A. The best I can recall it was in the latter part of October.

Q. How are you able to fix that date?

A. Well, as I recall, were were planning sort of a pre-Halloween party, and he moved shortly thereafter.

Q. Who else was present during this card game?

A. Well, there was a girl, Pat Nugent, and a man by the name of Dutch, and a man by the name of Jimmie, myself, and Nicholas Guido.

Q. What was the result of that card game?

A. Well, the result was that Nick won quite a bit of money.

Q. What kind of a card game was this?

A. It was call rummy.

Q. What time did it begin?

A. It began in the evening, I would say sometime between seven and nine o'clock.

Q. How long did that game continue?

A. Well, it continued until the late hours of the morning.

Q. Did you lose any money in that game?

A. Yes, I did.

579 Q. Did Jimmie lose any money in that game?

A. Yes, he did.

Q. Did Dutch lose any money in that game?

A. Yes, he did.

Q. Did you pay the defendant, Mr. Guido, the money you lost at that time?

A. Yes, I did.

Q. How much did you lose, if you recall?

A. Oh, about forty or fifty dollars.

Q. By what means did you pay him? Was it by cash?

A. By cash, yes, sir.

Q. Did you say Dutch lost any money?

A. Yes, sir, I presume so.

Q. About what amount, if you know?

A. I don't know exactly.

Q. Did he give the defendant, Mr. Guido, any cash at that time?

A. Yes, he did.

Q. Now, tell me about Jimmie, did he lose any money?

A. Yes, sir, he lost quite a bit.

Q. Did he give the defendant any cash at that time, if you know?

580 A. Yes, sir.

Q. Did he give him anything besides the cash?

A. Yes, he did.

Q. In other words, he lost some money that he was unable to pay at that time, is that right?

A. That is right.

Q. Did you ever see the participants in that game other than the defendant, at any time thereafter?

A. Yes, I did.

Q. When and where did you see either one of them?

A. Well, I seen them at John Chickatanas hot dog stand.

Q. When was that?

A. I recall that was a couple weeks after the game.

Q. Was the defendant also present on this occasion?

A. Yes, he was.

Mr. Green: You may cross examine.

581 *Cross Examination by Mr. McGarr.*

Q. What did you say your occupation was, Mr. Rochford?

By the Witness:

A. I am a vendor.

Q. I didn't understand you?

A. A vendor.

Q. An inventor?

A. A vendor.

The Court: A vendor.

Mr. McGarr: I see.

By Mr. McGarr:

Q. What do you vend?

By the Witness:

A. Oh, peanuts, popcorn and ice cream at the ball parks.

Q. At ball parks?

A. Yes.

Q. Are you working now as a vendor?

A. I am going to the Stadium tonight for the fight. I am to work at the fight.

Q. Was that your occupation at the time of this card game?

582 A. Yes, it was.

Q. How frequently do you work as a vendor?

A. Well, this year I haven't worked too much because there hasn't been any crowds so far. I was driving a cab, but a week ago I got in an accident and as a result I lost the job.

Q. What were you doing in October 1955, at the time of this card game?

A. Well, at that time I was working mostly for the football games. The baseball season was over then.

Q. At what stadium or place do you work football games?

A. At Comiskey Park and Wrigley Field.

Q. Are you self-employed, or are you employed by some organization?

A. I am employed by the concession at Comiskey Park, and Wrigley. Mr. Wrigley owns the concession at Wrigley Field.

Q. What was your approximate income at the time when you lost this fifty dollars?

A. Well, I would say I averaged, maybe, seventy or eighty dollars a week.

Q. Had you ever played cards with Nicholas
583 Guido before this particular occasion?

A. Yes, sir, on many occasions but it was just for smaller stakes than we played then.

Q. Have you ever played with him since?

A. On a few occasions.

Q. Are you a friend of his?

A. Yes, sir, a very good friend.

Q. Was this particular game in October, 1955, played with chips or with money?

A. It was played with money.

Q. Did you see any $2 bills in the course of that game?

A. I don't recall.

Mr. Green: I object to that, your Honor. There has been no evidence concerning $2 bills at that time, and that time was prior to the time of the robbery of the bank. I think the evidence is undisputed on that.

The Court: He said he didn't see any.

Mr. Green: Pardon me.

Mr. McGarr: No further questions, your Honor.

The Court: Any redirect?

584 Mr. Green: That is all.

The Court: That is all, Mr. Rochford.

The Witness: Thank you.

(Witness excused.)

Mr. Green: At this time the defendant will move for the admission of Defendant's Exhibits 4 through 12, inclusive.

The Court: Any objection?

Mr. McGarr: I have no objection to 12, your Honor, establishing that they—

Well, I have no objection to any of them. They may be admitted.

The Court: They may be admitted.

(Said exhibits, so offered and received in evidence, were marked Defendant's Exhibit 4 to 12, inclusive.)

Mr. Green: The defense rests, your Honor.

The Defendant Here Rested His Case.

The Court: Any rebuttal?

Mr. McGarr: Yes, there is, your Honor.

The Court: Proceed.

585 Mr. McGarr: Mr. Norton, will you take the stand, please.

Mr. Norton: Yes, sir.

The Clerk: Raise your right hand and be sworn.

Mr. Norton: Yes, sir.

(Witness duly sworn.)

And thereupon the Government, to further maintain the issues in its behalf offered and introduced the following evidence in rebuttal:

GERARD JAMES NORTON, called as a witness on behalf of the Government in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. State your name, sir?

By the Witness:

A. Gerard James Norton.

Q. Your business or occupation, Mr. Norton?

586 A. Special Agent for the Federal Bureau of Investigation.

Q. To what office are you now assigned?

A. San Francisco.

Q. In November, 1955, what office were you assigned to?

A. The Chicago office.

Q. Were you during the course of your duties in the Chicago office assigned to the investigation of the Maywood-Proviso State Bank robbery?

A. I was.

Q. Calling your attention to November 5, 1955, were you on that day participating in the investigation?

A. Yes, sir.

Q. Were you on that day in the vicinity of the Roxy Theatre?

A. Yes, sir.

Q. About where is the Roxy Theatre located, if you recall?

A. On the southeast corner of Monitor and Division.

Q. About what time did you arrive in that vicinity?

587 A. At about 11:30 in the morning.

Q. What day of the week was that, if you can recall?

A. A Saturday.

Q. And by what means of transportation did you arrive there?

A. I was in a Bureau vehicle.

Q. Were you driving?

A. No, I wasn't.

Q. Was there another Agent with you?

A. Yes, there was.

Q. Who was he?

A. Special Agent Gordon Kirby.

Q. Did you have under observation at that time a particular automobile?

A. Yes, sir, I did.

Q. Will you describe that car, please?

A. It was a 1955 black Cadillac.

Mr. Green: Your Honor, I am going to object to that. I don't see any possible rebuttal here. I thought he was going to get into something else as to the conversation with the defendant, but this is going beyond the scope

588 of rebuttal.

Mr. McGarr: I think what he will do is lead up to the conversation he had at this particular time.

The Court: Conversation with whom?

Mr. McGarr: With the defendant.

I am merely leading up to the circumstances under which he saw the defendant at that time.

The Court: You may do that.

Mr. Green: I would object to that. I think he should be allowed to state that he went there and he had a conversation with the defendant and rely on that.

The Court: Can he say why he went there?

Mr. McGarr: I think he can, your Honor.

The Court: The objection is overruled.

By Mr. McGarr:

Q. Will you describe that car, please?

By The Witness:

A. It was a coupe, an all-black car with white side-
589 walls, bearing 1955 Illinois license No. 1 571 499.

Q. Did you see the defendant Nicholas Guido on that day?

A. Yes, I did.

Q. Do you see him in the court room?

A. Yes, I do.

Q. Will you point him out, please?

A. Right over there with the brown suit (indicating).

Mr. McGarr: For the record, the witness has identified the defendant Guido.

By Mr. McGarr:

Q. When did you first see the defendant Guido and where, in that vicinity?

By The Witness:

A. I first saw him in the luncheonette on the southwest corner of the intersection of Monitor and Division.

Q. Where were you at this time?

A. I was in that luncheonette.

Mr. Green: I would like to object again, your
590 Honor, and I respectfully submit that this is not re-
buttal. It is not rebutting anything that was said in the case in chief.

The Court: Let us get down to what conversation you want to put in.

Mr. McGarr: We are going to have it right now, your Honor.

The Court: He does not have to give his every move out there before he had the conversation, if he had one.

Mr. McGarr: Your Honor, I have a purpose in asking him to give his motives.

Mr. Green: I object to the purpose.

Mr. McGarr: It will be clarified by a subsequent witness.

Mr. Green: I object to what has been said and what has been done.

Mr. McGarr: In order to do so I will have to lay this foundation to establish the date.

The Court: Is that going to be in rebuttal of something that was brought out on the defense?

Mr. McGarr: Yes, it is, your Honor.

591 The Court: If he promises to do that we will let him do it; if he doesn't do it, it will all be stricken out.

By Mr. McGarr:

Q. Where were you when you first saw Guido enter this restaurant or luncheonette?

By The Witness:

A. I was in the luncheonette.

Q. Were there any other persons present at that time?

A. Yes, there were.

Q. Any persons whom you can name or identify?

A. Yes, there were. Patricia Nugent was in the luncheonette, and the woman who operated the luncheonette.

Q. And what if anything did Guido do when he entered the luncheonette?

A. He entered the luncheonette—

Mr. Green: I object to this, your Honor. I don't see how in any way whatsoever this can be regarded as being rebuttal.

The Court: He has said it is related to something
592 that is going to be brought out by a subsequent witness, and he says he needs this in order to have the testimony of the subsequent witness.

Mr. McGarr: That is correct, your Honor.

The Court: That is the way I understand it.

By Mr. McGarr:

Q. What if anything did Guido do after he entered the luncheonette?

By The Witness:

A. He looked around in the luncheonette, and then he left the luncheonette.

Q. Did you follow him?

A. I left the luncheonette and viewed him visually walking down Division Street, west on Division Street.

Q. Then what did you do?

A. Well, I stayed at that point watching him, and then Miss Nugent came out of the luncheonette and I spoke to her.

Q. What happened after that?

A. I went across the street and got into the auto-
593 mobile where Mr. Kirby was in, and I put in a radio call and proceeded from the curb in front of the Roxy Theatre across the street to Division, and made a large square, and approached Guido from the opposite direction.

Q. Did you have a conversation with Mr. Guido at that time?

A. Yes, I did.

Q. Who else was present at the time of this conversation?

A. Special Agent Kirby.

Q. And you and Guido?

A. That is correct.

Q. Anyone else?

A. No.

Q. Would you relate what was said, beginning with what Mr. Guido said and what you said?

A. We inquired as to the ownership of this Cadillac we were concerned with, and first he said that he didn't know anything about it. He gave us his name as Tony Guido. He said he was the brother of Nick Guido and hadn't seen Nick for six months, and that he was a bookie.

Upon further question he admitted he was Nick
594 Guido, and that the vehicle concerned was his, and it was registered in his wife's Grace Schiavone's name who lived at 705 South Kedzie.

Q. Did you have any conversation with him relative to the luncheonette, or what he was doing there?

A. I asked him if he knew Patricia Nugent.

Mr. Green: If the Court please, any testimony about the luncheonette, I don't see would be rebuttal?

The Court: I don't recall anything about a luncheonette?

Mr. McGarr: I will withdraw that question.

(Question withdrawn.)

By Mr. McGarr:

Q. Was there any conversation as to where Mr. Guido had spent the previous night?

By The Witness:

A. Yes, he said he had spent the previous night with his wife.

Mr. Green: I object to that, your Honor, trying to
595 impeach a witness on immaterial issues that were not brought out on direct cross examination. He was asked whether or not he had said such and so to the Agent and he answered that.

The Court: He said what?

Mr. Green: Where he had spent the previous night, not speaking of the offense but the night prior to the offense, the third. There was nothing in the record about that, as I recall.

I think it is an attempt to impeach on immaterial matter.

The Court: He may answer the question.

By The Witness:

A. (Continuing) With Grace Schiavone at the Town Hotel in Cicero.

By Mr. McGarr:

Q. Was there any conversation as to whether he knew Patricia Nugent?

By The Witness:

A. Yes, I asked him if he knew Patricia Nugent and he insisted that he didn't.

596 Q. Was there another Federal Bureau of Investigation car in the vicinity at that time?

A. Yes, there was.

Mr. Green: I am going to object to that and ask that that go out.

Mr. McGarr: This is for the same purpose. I will subsequently present testimony to establish the particular day and place where the other witness observed things; for the purpose of the other witness establishing the date to which he observed this other activity of the defendant.

The Court: Well, upon that ground—

Mr. Green: Even so, as I understand it, that could not be proper rebuttal. The record is barren as to anything that transpired on the 5th.

I would like to be heard on that, your Honor.

The Court: Well, let the jury retire and we will hear you.

(Whereupon the following took place outside the
597 presence and hearing of the jury:)

Mr. McGarr: I would like to explain to your Honor the purpose of this questioning.

The next witness who will take the stand is the cashier of the Roxy Theater. She will testify that on this particular night in November, Friday night, she saw the defendant Guido enter the theatre for the first time at nine or nine-thirty. She is unable to fix the exact date except by reference to the fact that she observed all the activities which the witness is now describing on the next day.

Therefore, if she testifies as to observing the same activity as Agent Norton and he fixes that date as November 5th, she would then be able to say that on the previous night, November 4th, she saw Guido enter the theatre for the first time at about nine-thirty in the evening, although
Patricia Nugent had gone in much earlier. It is solely
598 for the purpose of enabling her to fix that date as to the activities of Agent Norton which she observed.

Mr. Green: Now, I don't regard that, your Honor, as being proper rebuttal on the case of the defendant.

Your Honor, here we are having this witness establishing an investigation of the defendant who is now on trial for a bank robbery. He was out on this investigation of this man prior to the time there were any $2 bills passed or anything else on the very next day. I think the impact of that upon the jury would necessarily be most great and most grave in so far as the rights of the accused are concerned.

I think, of course, and I submit he is entitled to state conversations which he had with the accused, albeit. But what he has related so far as conversation is concerned
does not differ with what the defendant has already
599 testified to on the stand.

The Court: Hasn't he got the right to show when the defendant first entered the theatre on the night in question?

Mr. Green: He would certainly have the right to introduce such evidence but not by having this witness testify as the witness now on the stand testify to activities, the nature of which are very damaging to the defendant.

I think, of course, the young lady from the theatre to get on the stand and testify as to what she remembers, I think that is true, but I don't think under the guise of having her fix the time we should be permitted to have evidence as to very damaging activities on the part of the investigative agents going into this record. It is a matter of common knowledge, I think, that any juror would believe if an investigation of this particular man was being carried the next morning, that they were looking for
600 a certain car, that that would necessarily have a grave and prejudicial effect.

That is the basis of the objection, your Honor.

The Court: There is much merit to a lot of what you say. The Government, however, is entitled to get this evidence that is material.

Mr. McGarr: That is correct.

The Court: If you object to it, I think they nevertheless have the right to introduce the testimony, but they don't have to put it in with this great particularity that is evidenced from the way they are proceeding at the present time.

Mr. McGarr: The point I would like to make, your Honor, is that the witness is taking the stand and indicating certain activities of his, where he spent the night and with whom, and so on. This witness is designed primarily for one reason, to establish the fact he made contradictory statements.

601 The Court: Well, you have done that.

Mr. McGarr: On one occasion he said he didn't remember making such a statement.

The Court: He has testified to the statement the defendant made.

Mr. McGarr: That is correct, your Honor.

That in itself reveals that this particular Agent on that date was investigating or talking to Guido on the street, and to the extent that that is damaging to him, it is all right to put in that conversation, I think, is unquestioned even by Mr. Green as he points out, and we do have a right to put that in. That does reveal that an FBI Agent was questioning Guido on that day. As to the extent that is damaging to him, the damage is already done, and it must necessarily be done because we do have that right to put it in.

The Court: The only question I see here is how
602 much particulars must you go into in order to get you in the position you can use the testimony of this young lady?

Mr. McGarr: I think we have arrived at that position now, your Honor.

The Court: I don't know, you said you had arrived at it quite a while ago, and you kept right on introducing the same sort of testimony.

Mr. McGarr: The point is this, your Honor, the young lady cashier observed all of the activities, and she was sitting in a glass booth in front of the theatre, and she will describe these activities and her recollection will correlate with that of the Agent and I just wanted to put all of his activities in.

The Court: Is that as far as you are going now?

Mr. McGarr. Yes, sir, it is, your Honor.

603 We have no further questions of this witness, your Honor.

The Court: Bring the jury back.

(Whereupon the following took place in the presence and hearing of the jury:)

The Court: Cross examine.

Mr. Green: No cross examination.

The Court: Witness excused.

(Witness excused.)

The Court: All right, call your next witness.

Mr. McGarr: We will call Miss Murphy.

The Clerk: Will you raise your right hand and be sworn.

Miss Murphy: Yes.

(Witness duly sworn.)

604 DOLLIE MURPHY, called as a witness on behalf of the Government in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McGarr.

Q. State your name, please?

By The Witness:

A. Dollie Murphy.

Q. Will you speak loud as you can, Miss Murphy?

A. Yes, sir.

Q. What is your business or occupation?

A. I am cashier at the Roxy Theatre.

Q. Calling your attention to the autumn of 1955, were you employed as cashier at the Roxy Theatre?

A. Yes, I was.

Q. During that particular period, what days or nights did you usually work?

A. I start work at six in the evening, and I go in at one o'clock in the afternoon on Saturdays.

Q. Were you working there at that particular time?

A. Yes, I was.

605 Q. Calling your attention to a Saturday in November, 1955, do you recall observing anything unusual occurring while you were working as a cashier in the theatre?

A. Well, we open at one o'clock. I get to work about 20 to 1:00 to get the box office open, and I noticed a girl and a man talking on the other side of the street alongside of the coffee-ice cream shop.

Q. Did you ever see this girl before?

A. Yes, I have.

Q. Do you know her name?

A. No, I don't know her name. I had seen her.

Q. Had you ever seen the man before?

A. No, this man was talking to the girl.

Q. Have you since been introduced to Special Agent Norton of the FBI?

A. Yes, sir.

Q. Do you now know him to be the man you saw on that day?

A. Yes.

Q. Describe what you observed going on from this point, please?

The girl was talking to the man across the street,
606 and I noticed them—

Mr. Green: Your Honor, I ask that this go out. I don't see the materiality of it, a girl was talking to a man across the street.

Mr. McGarr: She is able to describe the activities which were the same as those previously testified to. Solely for the purpose of fixing the date, your Honor.

The Court: The ruling will be the same.

By Mr. McGarr:

Q. After this what if anything did the man do?

By The Witness:

A. The girl left the man and went down Division Street. The man went the other way and got into a car.

Q. Do you remember what kind of a car it was?

A. No, I don't remember, only it was a car.

Q. Could you see the man after he got into the car, this man that you now know as Agent Norton?

A. Yes.

Q. What did he do?

607 A. He got into the car. The box office is right at the corner. He pulled up to the corner and stopped at the intersection and I saw the same man in that car, and then he went down the street north.

Q. Was Agent Norton driving this car?

A. No, he wasn't.

Q. Did you see him do anything unusual while he was in the car?

A. He was talking into a microphone on the dashboard which aroused my curiosity because you don't see something like that all the time.

Q. Calling your attention now to the previous day which, I believe, would be Friday, is that correct?

A. That is right.

Q. Were you working in the Roxy Theatre that night?

A. Yes.

Q. What time did you come on duty on Friday?

A. Six o'clock.

Q. Did you notice any unusual activity on that particular night?

A. Business was very slow up until about seven
608 o'clock. Shortly after six a girl came in and bought a ticket. I wouldn't remember that except a little while later she went out again.

Mr. Green: I can't understand you. Will you speak loudly, please?

Mr. McGarr: Yes, will you speak loudly?

By the Witness:

A. Shortly after six o'clock a girl came into the theatre and bought a ticket. Shortly after that she left the theatre and went out across the street. That is what called my attention to her.

During the course of the evening she went in and out of the theatre two or three different times.

By Mr. McGarr:

Q. Did you see her during the course of the evening, or did you ever see this girl with a man?

By the Witness:

A. Not until later on in the evening, about, oh, I would say about 9:15. Somewhere between 9:00 and 9:30. A man came up and bought a ticket, and she was across the street in the coffee shop at the time. When she saw
609 him come up—she had been watching for him, evidently, she ran across the street and—

Mr. Green: I object, your Honor.

The Court: That goes out.

By Mr. McGarr:

Q. Just indiciate what she did?

By the Witness:

A. She ran across the street, stopped the man, and talked to him. They stood in front of the box office and talked four or five minutes.

Q. Had you ever seen this girl before that day?

A. No.

Q. Did you see her the second day, the next day?

A. Yes. That was the same girl.

Q. Was that the same girl you saw talking to Agent Norton?

A. Yes.

Q. After they stopped in front of the box office to talk, will you indicate what happened after that?

A. They talked a few minutes and then the man came

back to me and asked for a refund; he had changed
610 his mind. So I gave him his money back.

He turned to the girl—he walked away from the box office, and he turned to her and he said something about "Never mind, I am going in anyway." And he bought a ticket again.

Q. Do you see that man in the court room?

A. Yes, I do.

Q. Will you point him out?

A. He is over there in the brown suit (indicating).

Mr. McGarr: Let the record show the witness has indicated and identified the defendant Nicholas Guido.

By Mr. McGarr:

Q. What if anything happened after that? Did he enter the theatre at that time?

By the Witness:

A. He entered the theatre but she didn't. She went back across the street to the coffee shop and maybe about ten or fifteen minutes later she came out of the coffee shop and went back to the theatre only she purchased another ticket at the time and went into the theatre.

611 Q. What time was it you said you first saw this man Nicholas Guido arriving at the theatre that evening?

A. Between nine and nine-thirty in the evening.

Mr. McGarr: No further questions.

The Court: Cross examine.

Cross Examination by Mr. Green.

Q. What evening was this, Miss Murphy?

By the Witness:

A. It was on a Friday evening the early part of November, 1955.

Q. Did you ever see the man that was talking with this lady before?

A. On Friday or Saturday, do you mean?

Q. Before that Friday evening had you ever seen him before?

A. No, I would say no.

Q. At no time as far as you can remember?

A. No.

Q. You say you saw him again the next day on a Saturday?

A. That is right.

612 Q. When was the next time you saw him?

A. Actually, I saw him all week long.

Q. All that week?

A. That is right.

Q. In that neighborhood?

A. Yes, sir.

Q. Attending that show, the Roxy Theatre?

A. No, sir. He was walking down the street going into the apartment building across the street.

Q. Were you living in the neighborhood, or did you have any cause to be in the neighborhood, other than the fact that you lived there?

A. I live two blocks from the theatre and I have lived there for thirty-four years.

Q. And it was while you were working at the theatre that you saw this man throughout the following week walking into the building, is that so?

A. Yes, sir.

Q. When was the last time you saw him prior to your seeing him in this court room this afternoon?

A. That week.

613 Q. That week?

A. Yes, sir.

Q. You mean the following week, I take it?

A. Yes, sir.

Q. You never saw him until you saw him today since then?

A. No.

Q. You were brought down here by subpoena, I take it, from the Federal Bureau of Investigation?

A. Yes, sir.

Q. And certain Agents of the Federal Bureau of Investigation, I take it, talked to you on various occasions before the subpoena was served upon you?

A. Yes, sir.

Q. Who talked to you from the Federal Bureau of Investigation?

A. Two Agents came out to the theatre to question us shortly after the occurrence.

Q. How long afterwards?

A. Oh, I would say about a month or so.

Q. About a month afterwards?

A. That, I wouldn't know what date or just exactly when.

614 Q. Did they show you any pictures at that time?

A. Yes, they did.

Q. They showed you a picture, didn't they, just one picture?

A. Yes.

Q. No other pictures?

A. I am not sure whether it was just one picture or more than one they showed. They had a group of pictures.

Q. How many did they show you of the group, the best you can recall?

A. I couldn't say for sure. I would say they had at least five or six pictures.

Q. How many people during the course of a week attend the Roxy Theatre?

Mr. Green: Withdraw that.

(Question withdrawn.)

By Mr. Green:

Q. What was the attendance at the Roxy Theatre, approximately, during the month of November, 1955?

By the Witness:

A. I couldn't tell you that either.

Q. Well, do you sell five hundred tickets a night?

615 A. No.

Q. Two hundred tickets a night?

A. Closer to two hundred tickets.

Q. What is your busiest night of the week, Miss Murphy?

A. Saturday night.

Q. What is your next busiest night of the week?

A. Sunday.

Q. And after that?

A. Probably Wednesday.

Q. Where would Friday be?

A. About after that.

Q. Friday would be the fourth busiest?

A. Week ends are entirely different than week days.

Q. I didn't ask you that.

Isn't Friday busier than any day during the week?

A. No, it isn't.

Q. It wasn't during the month of November?

A. No.

Q. Wouldn't the records of the Roxy Theatre substantiate that?

616 A. I would say Saturday and Sunday are busier than Friday.

Q. You just told me a moment ago that Wednesday is busier than Friday?

A. That depends upon the picture you are running, the show that you have.

Q. What picture was running at that time in November, 1955?

A. "To Catch a Thief."

Q. And what else?

A. "Cobweb."

Q. Pardon?

A. "Cobweb."

Q. Did the Agents of the Federal Bureau of Investigation who saw you about a month after this occurrence ask you about that picture?

A. No.

Q. They did not?

A. No.

Q. Now, Miss Murphy, the Federal Bureau of Investigation communicated originally with you? You didn't communicate with them, isn't that right?

A. That is right.

617 Q. They came to you, not you to them, isn't that right?

A. That is right.

Q. And when they came to you they asked you about whether or not you had seen the individual whose picture was displayed to you, isn't that so?

A. That is right.

Q. Why then didn't they show you five pictures?

A. They were different men, different pictures, and out of the different pictures I was able—I won't say able, but I saw one they referred to.

Q. Do you remember the name of the Agent that came to see you?

A. I remember the name of one of the Agents.

Q. What was his name?

A. Mr. Deenen.

Q. Mr. Norton was not one of those Agents, was he?

A. No.

Q. Will you spell that Agent you saw his name?

A. Deenen, D-e-e-n-e-n.

Q. Now, you say that was the first time they
618 talked to you?

A. Yes.

Q. And you told him on that occasion the same thing you have related to the court and jury here today, is that right?

A. Yes.

Q. When was the next time an Agent from the Federal Bureau of Investigation talked with you?

A. Well, I was called on the phone.

Q. When?

A. About two weeks ago; three weeks.

Q. You didn't hear from the Federal Bureau of Investigation from the time about a month after this night in early November until two weeks ago? At no time did you hear from them?

A. I will have to retract that. They did come out to my house shortly after the visit to the theatre. They came to the theatre first and then they came out to my house, and then not until now.

Q. Who came out to your house?

A. Mr. Deenen and another man.

Q. When he came out to your house, what did he ask you?

619 A. The same questions about what had happened that night, and a couple of things, just the same things that they wanted to verify.

Q. They questioned you about a month thereafter and then they came out a few days later and asked you the same things again?

A. Not a few days; maybe a month or two after that.

Q. About a month or two after that?

A. Yes.

Q. In other words, he came out probably sometime

in December, and then he came out again in January or February?

A. Yes.

Q. And in January or February he had with him these five pictures again, didn't he?

A. No.

Q. He didn't?

A. No.

Q. Who did you talk to about your testimony here today, if anyone?

A. I am sorry, I didn't hear you?

Q. Who did you talk to, if anybody, about your testimony here today? Did you talk to anyone about the 620 things you just testified to?

A. The FBI Agents, and Mr. McGarr. I met him in his office before I came here.

Q. Pardon?

A. I came down to Mr. McGarr's office. I was called down to his office.

Q. Today?

A. That is right.

Q. But that was the first time that you talked to anybody about this case since the time in January or February when the Agents came to your house?

A. No, I was subpoenaed last week and I came down and talked to them.

Q. You came down last week?

A. Yes.

Q. You saw Mr. McGarr in his office then?

A. Yes.

Q. At that time when you came into Mr. McGarr's office, there was a picture of the defendant, Mr. Guido, laying on Mr. McGarr's desk, isn't that so, you were shown the picture again on that occasion?

A. Yes, sir.

Mr. Green: That is all.

The Court: Any redirect?

621 Mr. McGarr: No redirect.

The Court: That is all, madam.

(Witness excused.)

Mr. McGarr: That is all the rebuttal the Government has.

The Court: Does the defense have anything further?

Mr. Green: Just one moment, your Honor.

The Court: Yes.

Mr. Green: I don't think there will be anything further, your Honor, but I understand that you are going to adjourn this afternoon recess, and I would like to wait until after the adjournment before announcing whether we are going to close or not.

The Court: After the recess?

Mr. Green: Are you going to have a recess this afternoon?

The Court: Yes.

Mr. Green: If we could have a recess for four or five minutes.

The Court: We will take a recess for a few minutes.

(Recess taken.)

622 Mr. Green: The defense rests, your Honor.

The Defendant Here Rested His Case.

Mr. McCarr: The Government rests, your Honor, except we might handle the instructions this afternoon.

Whereupon The Government Rested Its Case In Rebuttal.

The Court: That concludes the testimony in this case. The next part of the procedure will be for the attorneys to address the jury, but I think it is so late in the afternoon we will now recess the jury until tomorrow morning at ten o'clock.

(Whereupon the jury was excused and the following took place outside the presence and hearing of the jury:)

Mr. Green: Does your Honor have any desire about fixing the time of argument?

The Court: No, you folks fix your time.

What do you say?

Mr. Green: What do you say, Mr. McGarr?

Mr. McGarr: Forty-five minutes. Would that be
623 too long? The evidence in this case is not very complex.

The Court: Is forty-five minutes enough for you?

Mr. Green: I think we could conclude in forty-five minutes, but I just don't like to be held to it.

Mr. McGarr: Could we agree on it then?

Mr. Green: Let us say an hour, and if we run out of things to say, we all will have good sense enough to sit down.

The Court: I don't know about that latter statement.

(Laughter.)

Now as to these instructions, why can't you folks sit down and agree upon such of them as you can agree and those that you are in dispute on we can take them up in the morning.

Mr. McGarr: What time would your Honor like to meet in the morning?

The Court: Oh, I could meet you here at nine-thirty. In the meantime, you folks could sit down, either here or downstairs somewhere, and maybe agree upon most of them.

624 Mr. McGarr: All right, your Honor.

The Court: Those that you can't agree upon we will discuss them with you here in the morning at nine-thirty.

Mr. Green: Thank, you, your Honor.

The Court: Oh, yes, the plaintiff will number his instructions on the left at the bottom, and the defendant will letter his at the right bottom.

Mr. Green: Yes, sir.

Mr. McGarr: Yes, sir.

The Court: Do you have an extra copy?

Mr. Green: Yes, sir.

The Court: Mr. McGarr, do you have an extra copy?

Mr. McGarr: Yes, sir.

The Court: Then I suppose you folks could sit here, or go down to your office or somewhere and agree upon such instructions as you can.

Mr. Green: Yes, sir.

Mr. McGarr: Yes, sir.

The Court: I will see you tomorrow morning at 9:30.

625 (Whereupon the further hearing of the above-entitled matter was continued until 9:30 a.m. Thursday, May 2, 1957.)

626

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 CR 62) * *

Before Judge Igoe and a Jury,
Thursday, May 2, 1957,
9:30 o'clock a.m.

Trial resumed pursuant to adjournment.

Present:

Same as before.

And thereupon the following proceedings were had herein in chambers, out of the presence and hearing of the jury:

627 The Court: All right, gentlemen.

Mr. McGarr: Your Honor, we have agreed upon practically everything last night.

The Court: That is fine.

Mr. Green: I think your Honor has the originals.

Mr. McGarr: I believe so.

The Court: Yes.

What have you disagreed on?

Mr. Green: We *have disagreed* really on nothing now other than instruction H, which is the customary instruction.

Mr. McGarr: No question about that. He felt it should be repeated.

Mr. Green: We felt it should be repeated in so far as the defense is concerned. We have reason to believe that it should be repeated, and even if it was repeated forty-three times it would not totally erase the facts from the jury. That was our only reason.

The Court: Is that all?

Mr. McGarr: That is all.

Mr. Green: That is all.

We have rewritten the formal instructions.

628 The Court: I think there should be some reference made there.

Mr. McGarr: That it should be given again?

Mr. Green: There is some chance we will have to use the instruction as tendered.

I am not going to read these over again, but there are certain of them that I think should be given, one after another, but in reading the instructions you can see which ones are relevant.

For instance, I think Government's instruction No. 11 for the purpose it states, the first instruction should be given.

The Court: I agree with you.

Mr. Green: That instruction is agreeable.

Likewise, Government's instruction No. 2.

Mr. McGarr: Instruction 1 is withdrawn.

Mr. Green: 1 is withdrawn, yes.

Mr. McGarr: So, we will take that out.

Mr. Green: Government's instruction No. 2 likewise is agreeable.

The same thing holds for instruction 3.

629 And No. 4.

And No. 5.

And No. 6, that is not agreeable but in looking through the Government's instructions I have prepared a consolidated instruction which is now tendered as instruction No. 5, which is agreeable.

The Court: That takes care of No. 5?

Mr. Green: 5 and 6.

The Court: 5 and 6. So, we eliminate 5?

Mr. Green: Give No. 5.

The Court: Oh, yes.

Mr. Green: Next is No. 7.

The Court: 7?

Mr. Green: 7 is agreeable.

8 likewise.

9 is agreeable. They struck out down to the second line, the language.

Mr. McGarr: That has been done.

Mr. Green: Yes, they have done that. There is a substituted new 9.

Mr. McGarr: We will withdraw the original 9.

The Court: We are down to 10?

Mr. Green: 10 is agreeable except where it says

630 "You have heard evidence of the previous convictions of Nicholas Guido of several felonies. You may, and should—"

We believe that part of the instruction should read:

"You may take that evidence—"

with that "and should" eliminated it should be agreeable.

The Court: That is down in the fourth line?

Mr. Green: That is in the fourth line.

The Court: You want what eliminated?

Mr. Green: Where it says

"You may, and should take that evidence into consideration,—"

We should take out

"and should".

The Court: Is that agreeable to you?

Mr. McGarr: Yes, sir, your Honor.

Mr. Green: That covers the Government's instructions.

Now as to defendant's instructions, we have retyped some of these.

631 Mr. McGarr: We start with—

The Court: What about A?

Mr. Green: A is withdrawn.

Mr. McGarr: B is agreeable.

C is agreeable.

I think the last phrase, "and to a moral certainty," should go out. That is at the end of the instruction, the last four words—fiv word.

That instruction is agreeable only as to the last four lines where it says

"If the evidence in this case leaves upon the mind of the jury a reasonable doubt of the defendant's guilt, the law makes it your duty to acquit him."

The Court: Wait a minute. What are you reading from?

Mr. Green: I think you are confused here. You are reading Government's instruction A as of the last part of C.

Mr. McGarr: Oh, that is right.

Mr. Green: So, if we are going to give A, I think your Honor should set this one aside for the time being.
632 We will incorporate that in addition to C. That is correct, as I recall it?

Mr. McGarr: This one says that the—the last three lines—starts with "and if the evidence in this case—"

Mr. Green: Just a minute.

Where it says "If the evidence in this case—"?

Mr. McGarr: Yes, that becomes an addition to C.

The Court: You have C the way it is, and you are adding what?

Mr. Green: Adding, "if the evidence in this case—".

That is in the last part of A, beginning over here (indicating).

The Court: In instruction A where it says:

"if the evidence in this case leaves upon the minds of the jury any reasonable doubt of the defendant's guilt,—"

You want to put that in C?

Mr. Green: Right after C. That is added to C,
633 or that could be C-1.

The first sentence of instruction D is agreeable, but not the second. So, there is no change in the first part of the instruction. The Government is agreeable to striking from the instruction that sentence beginning with:

"To warrant a conviction of the defendant he must be proved to be guilty so clearly and conclusively—"

The Court: That is instruction D?

Mr. Green: Yes, sir.

The Court: You begin with the words

"To warrant—"

Mr. Green: It begins with the words:

"To warrant a conviction of the defendant he must be proved—"

From there on.

The Court: From there on down?

Mr. Green: Yes, sir.

The Court: The rest is all right?

Mr. Green: Yes, sir.

Also the words in the third line:

"great weight or—"

Those three words.

634 The Court: Where it says:

"great weight or—"

Mr. Green: Yes, sir.

The rest is all right.

F is agreeable with the exception of the next-to-the-last sentence.

The Court: Where it starts with:

"As respects to—"

Mr. Green: Yes, sir. Where it says:

"As respects to the defense—"

And down to the end of that sentence ending with the word "acquittal".

The Court: All right.

Mr. Green: G is agreeable.

H is agreeable.

The Court: H is the one we had before?

Mr. McGarr: That is the admonition instruction.

The Court: Yes.

Mr. McGarr: It is agreeable but there is a typographical error in that instruction. The word "accused" is spelled "accuses,".

The Court: That is in the seventh line: "accuses." It should be "accused".

635 Mr. McGarr: Yes, sir.

J is agreeable.

The Court: The next is K.

Mr. Green: The Government believes this is confusing and I am not certain as to what they are right. That is,

the last sentence of K. K is agreeable down to the last sentence.

The Court: Where it begins:

"You should not draw—"

Mr. Green: I think it states the law, but I think it is confusing. I agree with them. What I am trying to say here is this, this is a stock instruction but it is unfortunate that the jury shouldn't draw any inference or conclusion. The Government consents it is the law. I would like to have something in the instruction on this.

Mr. McGarr: How about making it this way:

"You should not drawn any inference or come to any conclusion as to what your verdict should be merely because of the fact that the court permits you to consider the case."

Mr. Green: All right, then we will eliminate the 636 words after "should be":

"—or should not be or what the evidence proves or does not prove—"

and connect up with

"merely because of the fact that the court permits you to consider the case."

Just eliminate those words:

" or should not be or what the evidence proves or does not prove,—".

The Court: That gets in everything you want.

Mr. Green: All right.

M is all right.

N is all right.

The Court: Did you say N or M? Are both of them all right?

Mr. Green: I don't have M.

Mr. McGarr: I don't have M either.

Mr. Green: We have L and then N.

Mr. Gorman: Where is I?

Mr. McGarr: I is withdrawn.

The Court: I is withdrawn.

Mr. Gorman: Here (indicating) is M.

N is all right.

637 Now we go to M. M is all right but we have a change here.

Mr. Green: We added that in the P instruction.

I suggest, your Honor, that we put that in the P instruction.

Mr. McGarr: So, we go from L to N and then P.

638 Mr. Green: On the third line is the change you are making, "unless" you are striking?

Mr. McGarr: Yes, and the word beginning on the third line "Not" strike that out. Make it read:

"Not to be considered by you only if you also find that—"

The Court: What was that?

Mr. Green: The word "not" the first of the same line is to go out.

Mr. McGarr: It should being with "Not to be considered". The "not" is to be stricken and the "unless" is to be stricken.

The Court: Then the instruction will read:

"There mere fact that the defendant had in his possession property alleged to have been stolen should be considered by you only if you also find that such possession by the defendant has not been explained by him in a manner which leaves in your mind a reasonable doubt of his guilt."

That is instruction M.

Mr. Green: The same change is to be in instruction

639 P, which is agreeable. That is in the third line where it begins:

"should not be considered by you unless you further—"

It should read:

"should be considered by you only if further—"

The Court: You are striking out the word "not", and the words "unless you", and putting in "only if" instead of "unless"?

Mr. Green: Yes, sir. We are striking out the 'not" and putting in "only if" in place of "unless".

The Court: All right.

Mr. McGarr: The M we are calling that as P-1 and it should be given after that.

The Court: M has been changed.

Mr. Gorman: And P-1, it is suggested that that be given after P.

Mr. Green: Now, both sides have prepared these instructions not knowing your Honor's practice or desire. You may have some instructions of your own that you care to give, but we think most everything has been covered by our instructions. There may be some gaps, but I 640 don't see any in glancing through them.

The Court: Well, these seem to cover the case pretty thoroughly.

Mr. Green: Yes, sir.

Now, we have a motion for acquittal at the end of the evidence, which will take a few minutes before the jury comes in which we would like to make.

The Court: Why can't you make it now?

Mr. Green: I guess we could. Why not.

The defendant at the close of all evidence moves the Court for judgment of acquittal. We are not going to bore your Honor with a repetition argument, or a repetition of the argument that was made at the close of the Government's case; that both paries made, or the authorities cited.

We will go through the evidence to explain the possession of the $5.00 bills which are in evidence in this

case, and found upon the defendant, which the defendant passed. That explanation is—

The Court: $5.00 bills or $2.00 bills?

Mr. Green: The $2.00 bills. I misspoke myself. I
641 would like to have the record clear in that regard.

That explanation brings us to the proposition of law and of the possession of the property required maybe such as would raise an inference of guilt of the defendant and does not exist unless it is recent. That has already been ruled upon by your Honor at the close of the Government's case. But in case it is necessary, it is our position now that that has been explained fully.

Now, of course, I am sure what the Government, on that explanation, their answer will be is that that is a matter for the jury to decide, and not the Court to decide as a matter of law. In that regard, I think I have got one rather fortunate case. The Supreme Court held—I am not going to give the entire case—but that is the case of People *v.* Sanders which is in 357 Ill., beginning at page 610. The Sanders case was a bank robbery case. A State Bank. The Wheaton Bank robbed by two men.

Two men were identified as having robbed it at about 11:30 in the morning. The men who had robbed the
641A bank were pursued into the woods down State. The woods were surrounded, and low and behold out of the woods there came a man carrying a sack. The man was arrested. He had some very strange conversations with the arresting officers, in which he stated that the sack contained potatoes. He also stated later that there could be some more; after showing the sack didn't contain potatoes, but rather money stolen from the bank. He also told the officers where they might find some more money in the woods, and they did find it.

The Court gave an instruction allowing the case to go

to the jury, an instruction which spoke of presumption of guilt which arises from such circumstances.

Now, I think the explanation that was given by the defendant, Mr. Sanders, in that case was a very peculiar one. I will read that explanation:

"He said he left his home about 11:45 carrying a scout ax and went over to the Hickman woods, where he dug up some sassafras roots to make tea; that he saw a man who weighed about 180 pounds, possibly
642A heavier, who was dressed in a light-colored overcoat and light-colored hat. The man was a stranger to him. The man crossed the small branch above mentioned while Sanders was digging the sassafras roots, came to within 75 or 100 feet of him, asked him his name, which Sanders told him, then the man dropped his head and studied a bit, and said, 'You look like a fair, honest man; I will tell you something.' The stranger told him there was some money in a stump on the side of the branch, near the bridge, and that from that stump, about 500 feet east, there was some more money. He further told Sanders to get the money and meet him at West City at the filling station or brick store on Saturday night. Sanders further testified that the man asked him what time the train left for Marion, and when informed that the train left about 7:45 that evening, walked on easterly and northerly and disappeared. Sanders said
642B he returned to his home, made himself some sassafras tea, got to thinking about what the man told him and was curious to know whether he was told the truth; that he had been contemplating going to one of his neighbors to get some seed potatoes to plant in some vacant lots that he expected to rent for that purpose; that he started over to his neighbor's farm, going along the public highway running on the west

side of the woods; that when he came to the neighborhood of the branch he turned off the road, went into the woods about 200 feet, looked for the stump and found the money; that the money was in a money sack, and that he put it in the potato sack he was carrying and went west from the stump to the road;—"

When he was arrested.

643 Now, that is quite remarkable I think. That is, when he was arrested he told a story that was not the same as he told in the future. The Supreme Court held in the Sanders case that it was reversed on the giving of an instruction which intended to cast upon the accused such evidence which was to be an inference on his guilt. I think that is a very remarkable case. There is a great deal more to it.

The Court: What was the charge in there?

Mr. Green: Bank robbery.

The Court: Bank robbery?

Mr. Green: Yes, sir.

I will read from page 61 of the opinion:

"It is also true such stolen money is given weight

643 Now, that is quite remarkable I think. That is, when he was arrested he told a story that was not the same as he told in the future. The Supreme Court held in the Sander case that it was reversed on the giving of an instruction which intended to cast upon the accused such evidence which was to be an inference on his guilt. I think that is a very remarkable case. There is a great deal more to it.

The Court: What was the charge in there?

Mr. Green: Bank robbery.

The Court: Bank robbery?

Mr. Green: Yes, sir.

I will read from page 616 of the opinion:

"It is also true that while Sanders' story as to how he came into possession of the stolen money is quite out of the ordinary, yet it may be true. It has been often said that truth is stranger than fiction. We might add that more often fiction is stranger than truth. There is nothing to contradict Sanders' story, circumstantial or otherwise, in the record. It is also true that he
644 did not tell the truth to Judge Hickman—"

Judge Hickman was the arresting officer also Judge of the court. They referred to him therein as the assistant state's attorney.

"—when interrogated as to what he had in the potato sack. He also did not tell all of what he now claims to be the facts as to how he came into possession of the money or how he acquired the knowledge of where it was, until later in the day on which he was seized."

645 Now, the case was reversed, and there was considerable discussion as to the instruction which was given because the instruction tended to rectify, in the language of the decision, to put in evidence of his innocence, and the produce evidence of his innocenece.

The case does not go so far as to say that such evidence would be insufficient to support a verdict. But here we have the precise identical situation of where an explanation has been given, and which I can very earnestly say strikes me as being a sound explanation, and being a sensible explanation to both the prosecution, the defense, and of course, the Court, with the Court's abundance of experience, and it would be more reasonable to them than it would be to a jury.

In our case we know he told the Bureau he received this money from James de Angelo. It was not the case of a man who came in and said, "You will find some money over there; you look like a good honest man. I will tell

you where you can find some money if you go pick it up."

It was not anything as fanciful as that. Yet the Supreme Court in that case said the story was uncontradicted.

646 Now, if we are to consider the matter of presumption on the matter of stolen property, and I still think this raises a very serious question after two and one-half months they say the money is recent.

All we have left is the shoe, and that shoe was placed where it was found in their home, in a home that was occupied by what, again, is uncontradicted according to the evidence, his estranged wife, and that is all.

In making this motion I am particularly concerned as to its outcome because I feel here we have a man who has been twice convicted of felonies, served two terms for convictions of more than—well there were more than two terms. There were three, and we have a man that has lived apart from his wife; a married man living with somebody other than his wife. He doesn't come from a very select neighborhood, and his wife, apparently, lives in a very strange neighborhood with other people, or at least it is peculiar to other people. The sad thing about this there is only one law which applies equally to those from a fortunate neighborhood and to this

647 man who has been convicted twice or more, served in the penitentiary.

I have very grave doubts as to how the jury is going to believe the evidence in this case if the case is allowed to go to the jury. I think this case is, and I am more than earnest in saying this, that it heartily recommends itself to the consideration of the Court on a motion of this kind, in order that the Court at the close of the case such as at this time would be able to intervene in order to prevent what might be a miscarriage of justice.

This motion is not lightly made, your Honor. I am very serious about it and I invite the Court's attention to the

human side of this case. I say now that there is nothing in this case to allow it to go to the jury. I say there is nothing to connect this evidence with the accused.

Mr. McGarr: I don't recall the defendant ever mentioning the shoes had been in his estranged wife's apartment, but he did not deny that the shoes were taken from the apartment in his presence and exhibited to him
648 among other things and when they were exhibited to him and asked if they were his, he said, "They could be."

In any event, I have no legal argument to make that has not been made earlier in the close of the Government's case. But I would like to point out that in the Sanders case, together with the law which has been previously cited, we have additional evidence which tends to put the defendant in the bank. This is the difference between this case and what was said in the Sanders case.

In that case, the Court allowed it to go to the jury and said a reversible error was given. The reversible error was as to the format of the particular instruction, claiming the instruction gave an unexplained possession of the money.

Therefore, in allowing the case to go to the jury, it was not held an error because of a motion for acquittal which, I assume, is the fact as stated here.

When Mr. Green was reading the Sanders case I noticed one part where it said:

"There was nothing to contradict Sanders' story
649 as how he came into possession of the money."

That is not true in this case. There are some circumstances and some contradiction as to how he came into possession of the money.

Finally, I would like to point out that the defendant at this point is in a less tenable position for a motion for acquittal than he was at the close of the Government's

case, because of the testimony as to his alibi or his presence at the Roxy Theatre which is contradicted by the witness for the Government in our case, and which the jury might well believe. This puts the defendant in the position of contorting a false alibi from which an inference can be drawn that he had reasonably concocted a false alibi.

Mr. Green: Replying to the Government's remarks, the first statement that was made was that the shoes were admittedly his, or that he said, "They might be."

Now, there were three agents who testified about that.

One agent said that he said it might have been. The
650 second agent said that he would admit nothing, or
said nothing, which was well within his rights. There is a conflict in the Government's own testimony on what was his position.

Now, that is the only thing we have in the case other than the location of the shoes in the closet of his wife's apartment that would tend to show it was connected to it.

The point about the alibi of the defendant is not what we are interested in. What we are interested in is the source of the money and he said he got it from de Angelo and that is uncontradicted. The fact that the shoes can be argued as being the shoes used in the bank robbery does not contradict his explanation as to how he got the money.

As to the Murphy witness she was a remarkable witness, but I just don't understand how people with no apparent interest in the outcome of the case can come in and say things like she said, that Friday night isn't a big night in the theatre, a theatre like the Roxy Theatre, and the Roxy Theatre only sells 200 tickets. Also she did change
her story to Friday night. It is a rather unusual
651 witness to come in and say things like that, yet the
record bears us out in this regard.

Also, I don't understand how people would come into court and have such a remarkable memory of a man, said that this man bought a sweater from me, and then only a half an hour before she came off the witness stand, she sees him in the corridor and she asked him, "Where do we go?" She didn't even know him then, but yet she was going to testify he was the man. I don't understand people like that. I don't think that is evidence to convict a person. I don't think there is evidence here enough to go to a jury.

The Court: I think there is sufficient here to allow it to go to the jury. Your motion will be overruled.

I understand you will take an hour on each side.

Mr. Green: We will try to make it within an hour, your Honor.

Mr. McGarr: Yes, sir.

Nothing less than an hour from you?

Mr. Green: I hope it won't take that long.

652 (Whereupon the following took place in the court room in the presence and hearing of the jury.)

The Court: Proceed, Mr. McGarr.

Mr. McGarr: Ladies and Gentlemen of the Jury, counsel in the closing argument summarizes the evidence for you, and directs your attention to the inferences which either side believes might be properly drawn from the facts, the testimony, and the exhibits.

In the way of summarizing the case which has been presented to you in the last few days we learn, first, that there is a bank named the Maywood Proviso State Bank in Maywood, Illinois at Division and Chicago, and its deposits are insured by the Federal Deposit Insurance Company, which insurance, of course, is the basis for the Federal jurisdiction in this case.

We learn from the testimony of people who were in the bank at the time that sometime prior to November, 1955

and officer of the bank directed them to place two packets of $2.00 bills, 25 bills in each packet, into two of the cashier's cages in the bank. Those bills we learned
653 later stayed in the cashier's cage day after day in the course of the bank's business and they were not dealt out to the customers.

The bank made and kept a record of the serial numbers of those bills, and this record was put into the evidence as Government's Exhibit 2, introduced by the bank officer who had made that record.

On November 4, a Friday evening at about 6:20, we learned from witnesses that three masked men entered the bank and perpetrated or carried out a bank robbery.

One man, we learned, stood inside of the entrance, and the witnesses told us he had a machine gun.

The other two bank robbers went into the cages of the bank.

I call your attention first, because he seems to be the man who saw most, to the testimony of the customer Terry Lucas who was waiting at the window of the cage No. 2 or counter No. 2, and he saw a masked bandit carrying a gun enter cage 1 by valuting over the counter, and go around into cage 2, and then leap out over the counter
654 of cage 3.

This man also had a pistol. The man with the pistol told the customer, Terry Lucas, "Turn around." When Lucas turned around he said that he was able to see inside the door a second man with a machine gun.

Mrs. Munger who took the stand was assigned to cage 2. She said she saw a bandit leap into cage 1. He said, "Get out of my way. We have a machine gun and we mean business."

She said that she definitely also saw this man carry a gun, not a machine gun.

She retreated along the passage way, and testified that after that she observed him no more.

She went back to cage 2 after the bank robbers left and found in the door entry, among other things, a package of $2.00 bills which had been placed there gone.

She also saw some bullets which had spilled out of somebody's gun or pocket in the course of the robbery.

Remember, Lucas saw a bandit go from cage 1 to 2 and 3. Mrs. Munger saw the same man but she saw
655 him only leaping into cage 1, after which because of her retreat down the passageway, she saw no more. Both of these men had guns.

Mrs. Peifer was the lady who took the stand and said she is regularly assigned to cage 3, immediately next to cage 2. She was not in at the time, but somewhere behind it at an adding machine or a calculating machine, as she said. She saw a bandit leap from cage 1 to cage 2. She heard him say, "Get out of the way. We mean business."

She saw the other man. She saw him enter cage 4. She then returned. She did not see him after that. I think, as I recall her testimony, she crouched down or knelt down or something, and was unable to see him any further.

When she returned to her cage, cage 3, next to cage 2, she also found the money drawer empty and missing, among other things, a second package of $2.00 bills which had been kept in there.

To sum it up, what these witnesses saw was this, one bandit with a gun said, "We have a machine gun. We mean business." He leaped into cage 1, then into 2,
656 and then into 3, and out of three cage. And I think the evidence is suspectible to a very reasonable and logical and inevitable conclusion that that man was Nicholas Guido, because the heel print found on the counter, according to the testimony of the agent who found it, it was on the counter in front of cage 3.

When these robbers left the bank, there remained in that bank two pieces of evidence. The men wore masks. No-

body could obviously identify them, but they did leave behind them two mute pieces of physical evidence which are really the basis of their undoing.

They left behind them a record of serial numbers of 50 $2.00 bills which they had taken from the bank, and they left behind them on the counter pictures of what they left behind, and you have already seen this, a heel print, on the top of the black marble counter. The pictures of that heel print have been introduced into evidence and you will have an opportunity to examine them more closely.

Now, we are able by using the evidence that we have
657 heard to determine what these men did next, or least what one of them did next. The man whose heel print was on that counter went from the bank—not knowing what he did in the interim because they left the bank at about 6:20—to the Roxy Theatre, and he arrived, according to the testimony of the witness Dollie Murphy, at some time in the vicinity of 9 or 9:30 o'clock.

He arrived to meet a girl who apparently had been waiting in the theatre or in the vicinity of the theatre since six for him. The girl obviously was to be his alibi. To see a movie and to say that he had been with her.

The girl kept leaving the theatre going across the street and reentering.

He was at the Roxy Theatre. The movie that night was one which curiously and appropriately was entitled "To Catch A Thief". But he was not there at 6 o'clock. As they said, he was there at 9 or 9:30, several hours after the bank robbery had been completed.

The girl's name was Patricia Nugent. Her relationship with the defendant was brought out. Her mother and
658 her sister took the stand and testified that they spent that evening in the theatre with Nicholas Guido. They had their own motives, whatever they might be for wanting to help Nick, but they didn't tell the truth. They

didn't tell the truth because Nicholas Guido was not in the theatre that night until 9:30, and neither the mother, Patricia, or her sister were probably in that theatre at all that evening.

All this was in November, 1955. Among the bank's loot, as we know, were some new $2.00 bills. Nicholas Guido had some of these $2.00 bills. He kept them. He kept them for two months or more. Where he kept them, we don't know. Perhaps in a box behind his sister-in-law's refrigerator. Perhaps he was worried about spending them. We don't know that. But we do know that after awhile he did spend them, the $2.00 bills. He did it on a Saturday, on January 14th.

He did it at the Sears Roebuck Store on North Avenue and Harlem. He spent five of those $2.00 bills which we have here as exhibits. Two of them are in their original condition. Three of them are smoked up, as the finger-
print man said they were smoked up by the chemical
659 process which used.

He spent three bills at the lingerie counter, and he spent one of them in the gas station. And he spent one at the candy counter.

The man in the candy counter remembers getting the bill, and of course, the cashier at the Sears' Store, the head cashier, said that that bill came from that store that day. But he cannot identify the man who spent it.

The lady at the lingerie counter could, however, and perhaps her memory was assisted by the fact that this man spent three $2.00 bills at her counter. Certainly an unusual occurrence.

You heard her say that because of the possibility of mistaking the $2.00 bills she segregated them from the rest of her cash.

The gas station man remembered Nicholas Guido, and he remembers better than anybody, and we proved he remem-

bered him. He remembers him because he helped him adjust the idling on his car. He remembers him because he got a $2.00 bill which was a little unusual. He remembers him, and we can prove he remembers him, because in repairing and doing work on his car, he did what they
660 always do at service stations, he filled out a form indicating a Cadillac, what was done to it, and how much was charged, and he wrote down the license number of the car.

The license number was 1571499, and if you heard that license number once during the trial you have heard it 15 times, as the license number of the black Cadillac driven by Nicholas Guido on various occasions, and he was observed by various people.

Of course, Nicholas Guido on the stand, admitted being at Sears. He admitted making purchases of some lingerie for Patricia. So, there can be no doubt, but if there was any doubt, we find an overwhelming piece of evidence as to possession and the spending of these $2.00 bills by Nicholas Guido, the identification of certain of these bills, on the $2.00 bills matched the fingerprints on the finger- and the fingerprints of Nicholas Guido as those fingerprints print card which was itroduced into evidence, those prints being taken by FBI Agent Gillem on the occasion of Guido's arrest.

When armed with a warrent, the FBI agents ar-
661 rested Nicholas Guido in his apartment at 1110 South Austin, the apartment was searched. They found what seemed inconsequential to Mr. Guido at the time, a pair of shoes. And when these shoes, together with the other things found were exhibited to Mr. Guido on the floor of the living room when the agents were leaving, and he was asked if they were his, you will recall Agent Hunter saying that he was the one who exhibited these things to him, he said, "They could be".

He didn't deny them. He didn't explain them away. He didn't say another man was living with his wife and those were the other man's shoes. He didn't say those were his brother's shoes. He didn't say they were his shoes, but he lent them to somebody. He didn't deny them. He didn't explain them away because it never occurred to him in the wildest stretch of his imagination that there was any reason for this. So, Nicholas Guido did not know that he had left his heel print on the black marble top in the bank.

Nicholas Guido took the stand. The case against him has two focal points. First, the heel print places him
662 squarely in the bank when it was robbed and, therefore, he had to prove he was somewhere else at 6:20 on Friday, November 4th. He did that by saying so himself, and by producing Patricia's mother and Patricia's sister to say that they were together in the movie. But the heel on this shoe and the heel print on the counter surely say those three persons were not telling the truth.

The $2.00 bills place the loot from the bank squarely in Nicholas Guido's hands. And so, the second focal point of the case must be explained away. Now, how did he ever get these $2.00 bills? A man named James de Angelo gave them to him, he said, in payment of a gambling debt. Where was de Angelo? He looked for him and he couldn't find him.

What evidence do we have other than the word of the defendant that he ever got any money from de Angelo? None.

What evidence do we have other than the word of the defendant from two of his friends about some card game that de Angelo even existed? None.

What evidence do we have that even if de Angelo did give Nicholas Guido some money that among that
663 money were any $2.00 bills? None.

He doesn't know when de Angelo gave him those

bills. He doesn't know where he kept them for the two months or more after he got them before he spent them.

He knows for certain that all of a sudden one day, after having these bills for several months, he decided that they were bad luck. So, he took them from where he had them and spent them at Sears.

Nicholas Guido was stopped and interviewed on the street by FBI Agent Norton on November 5th. These were some of the things he said: His name was not Nicholas Guido. It was Tony Guido. His brother's name was Nick. He had not seen him for six months.

He denied knowing Patricia Nugent.

He first denied ownership of a Cadillac which the agent pointed out to him and then later admitted it was his.

When asked where he had spent the previous night, the night of November 4th, 1955, he said he had spent it with his wife Grace at the Town Hall or the Town Hotel in Cicero.

664 When asked where his car, the black Cadillac had been the night before, he said it was parked all night at Diversey and Sheridan Road.

When asked where his wife Grace lived, he said that she lived between 6000 and 7000 on South Drexel Avenue.

None of those things were true. As evidenced by the fact that Nicholas Guido told a contrary story to this on the stand, or let us assume that one or the other of his stories is untrue, not knowing which.

In any event, this man was interviewed by an FBI agent, who of course, identified himself as such, and he told them a series of untruths.

A witness took the stand named Rochford. He said he had had some card games with Nick and de Angelo was there, and de Angelo lost money to Nick. He had never seen any $2.00 bills. He didn't remember any. Well, what does that prove? I suppose it tends to prove the existence

of de Angelo, and the fact that there was a debt in the card game. But assuming it proves that, what does it
665 bring us to? No conclusion whatsoever, except Nicholas Guido knows a man by the name of de Angelo with whom he played cards, and from whom he might have gotten some $2.00 bills.

The young man named Waddy, the mover, took the stand and he said that on November 4th he moved Nicholas Guido. Well, let assume he did. He moved them in the early part of the day and finished before 5 o'clock. Does that prove anything at all, except Guido moved that day? No, and if it did prove it, what difference does it make?

The real estate man, Palempini took the stand and said he rented an apartment to Guido, and Guido was empowered or authorized to take possession of the apartment on November 4th, but Palempini does not know whether he did or not. What does that prove? It proves nothing, except that Guido could have moved on that particular day, and if he did move, so what?

The man from Sears' Bank took the stand and produced the bank records which indicated that Guido was at the bank and made a large withdrawal on that particular
666 day from the joint account that he had with his wife Grace. We don't know the time of the day, except we learned it from Nick. It would be sometime earlier in the day. What does that prove in connection with the bank robbery and the events which took place at 6:15 that ev...g? It proves absolutely nothing.

Joseph Spagnoli who characterized himself in response to my question as Nick Guido's best friend, said that he arrived at the Division Street address, the new address, into which Guido was moving, and he arrived at about dark. He was not quite certain about the time, but it was in the evening, 5 or 6 o'clock, and no one was home. Of course, no one was home. Patricia was over in the Roxy

Theatre setting up an alibi, and Nick was out in Maywood robbing the bank. It does not surprise us that no one was home.

He said he waited a while and nobody came back and so he left. He said he watched television for a while. He said the only thing of any consequence was he found a note from Nick indicating that they had gone to the Roxy Theatre, apparently, advising him he could join them if he wished.

667 Do we believe he really found such a note? That is a question for the jury to decide. If he did find a note indicating Nick was at the Roxy Theatre, the more important question is was Nick really at the Roxy Theatre?

To sum up, Nick Guido was the man with the gun who climed out of cage No. 3 of the Maywood Bank. He left his heel print there. He might just as well have left a card with his name and address on it, because that heel print is the means of identifying him as the man who was in that bank.

The money he took out of that bank, probably unknown to him, is part traceable. When it was traced who was found spending it? Nicholas Guido. The man who took it from the bank.

While he was robbing this bank, his girl friend, Patricia, was nervously walking in and out of the Roxy Theatre, waiting for Nick, trying to set up an alibi which did not work because Nick arrived at the Roxy Theatre after 9 o'clock.

The summation of all of this evidence, considering it piece by piece, may not seem significant, but the sum-
668 mation of all of it, this picture would cause us to come to the irresistible and irreputable conclusion that Nicholas Guido participated in the armed robbery of the Maywood Bank on November 4th.

Thank you.

The Court: All right, Mr. Gorman.

Mr. Gorman: Judge Igoe, Ladies and Gentlemen of the Jury: On behalf of the defendant, Nicholas Guido, Mr. Green and myself, I want to first thank you for your close attention to this case as it has been brought to your attention. You have been in this court room now for about a week listening to evidence which the Government and the defendant has produced here.

I want to bring you back to that day when we first started here, when you folks were questioned concerning whether or not you should be selected to serve on this jury. I want to bring you back to the questions that were asked of you on that day, and the answers that you made to those questions. And to recall to your minds that you said in response to those questions, that you felt you could be a fair and impartial juror should you be selected to sit on this jury.

669 Now, the answers which you gave to those questions, and the oath which you took upon being selected as a juror in this case are as binding now as they were at the time you took that oath and made those answers.

Now, we have reached the stage of the trial where under our system the lawyers for the prosecution and for the defense make arguments and are free to comment on the evidence that has been produced here.

Now, the arguments and the comments we make are not evidence. They are only to guide you in your consideration of the evidence as you have heard it from the witness stand, then to apply to that evidence the law as Judge Igoe shall give it to you at the conclusion of these arguments.

Now, should we have nothing before us at this time but the picture as Mr. McGarr characterizes it to you, the mosaic, let us say, which the prosecution put together in

connection with this case, there may be in your minds some feeling, some thought, that they had satisfied the
burden which the prosecution has in every criminal
670 case of proving the defendant's guilt, and proving it
beyond any reasonable doubt.

But fortunately under our system of law, and under the way that we approach these things in this country and we like to think we approach them here in a better manner than they are approached any place in the world; fortunately under our system and under our laws, it is you folks who are going to decide whether or not the evidence that the Government has produced here—and they are the prosecutors in this case—whether or not that evidence is such as you feel that they have sustained the burden that has been put upon them under that system. Certainly, if you listened and paid attention only to the way that it was set out before you and argued by the prosecution, you might feel that they had done so. But more fortunately you folks and not the prosecution are the final judges of that. You heard the witnesses on the witness stand. You are in a position to judge whether or not those witnesses told the entire truth and the story, or whether not they colored their testimony, or whether
or not they satisfied the burden that is upon the
671 prosecution.

Now, remember that we are here and you folks are here only to decide one issue in this case. You are to decide solely whether or not the defendant, Nicholas Guido, participated in the robbery of the Maywood Proviso State Bank on the night of November 4, 1955. Not whether he possessed any of the funds from the bank. Not whether he was associated with any people who might have participated in that robbery, but solely to decide whether or not the Government, the prosecution here, has

sustained the burden of proving to you that he participated in that robbery.

Now, in order to do that, they brought in a great galaxy of witnesses, many of them testified to things which were immaterial in so far as proving whether or not to you that the defendant was actually in that bank. Many of them testified as to what we might call matters of jurisdiction. That is, matters which give the Government the right to prosecute this case. Testimony such as the bank was federally insured.

That testimony is solely for the purpose to show
672 that the Government has such jurisdiction and can prosecute this case. But it goes to no extent to determine in one way or another whether the defendant here is guilty as charged in this indictment.

Now, as to the weight that is to be given to the testimony of witnesses that testified here, I think that if you will review the testimony of those witnesses, and you find, as I know that you did find when they testified, certain confusion and doubt which arose in their testimony.

We had for an example, the testimony of the clerk, Mrs. Piefer, from the Sears' Store. That clerk testified that she could identify the defendant, as the man who had passed in the store some of the $2.00 bills which it had been testified were a part of the proceeds of the loot in this robbery.

And before we were through with her testimony that woman who had pointed him out so well, we found that she had met this man in the corridor and had not recognized him which was just a few minutes prior to her taking the witness stand here, when she said from the
673 witness stand that she hadn't seen him from that time that he entered the Sears' store until the time she saw him here in the court room.

Now, I only point that out not to say witnesses like that

are lying when they testify in a case such as this, but not having had the reason to implant in her mind the identity of that man at the time he appeared in the Sears' store, it was only natural that until such a time as it was pointed out to her who the defendant was in this case that she would not remember who that man was.

Then we had the testimony of the cashier, the head cashier I believe she called herself, of the Sears' store, Miss Herrs. She identified the $2.00 bills as having been turned in to her on Saturday from the various departments in the store. And upon being shown those $2.00 bills and asked if those $2.00 bills were in the same condition today as they were at the time she received them in the store, she again volunteered as witnesses are want to do, "Yes, they are in the same condition".

674 When shown three of those $2.00 bills were in a very blackened condition now, she was asked "Were these bills in the same condition then as they are today?", and having already said that they were, she was not going to retreat from that position. She was not going retreat from that position which she had taken, so she said, "Yes, that was the condition they were in when she received them."

Now, we know that was not so because later when they put on the expert witness from the Federal Bureau of Investigation from Washington who testified as to the fingerprints on those bills, he acknowledged that this discoloration on those bills was the result of a chemical process that was used at the time the bills were submitted to them, and that when they received the bills obviously they were not in that condition, and obviously they were not in that condition when Mrs. Herrs first received the bills.

So, you see that the mosaic or the picture that the Government would like to imprint or paint for you in so far

as each one of these witnesses is concerned is not as
675 clear and is not as plain as it would seem when you listen to the prosecution when they relate what their story is, and what their theory is of this case.

Now, again, in that connection, and in connection with the possibility that witnesses in recalling things that happened some time ago; and mind you, witnesses who would have no occasion to be specifically directed, or their attention directed to anything particular at the time the incidents were occurring, might fall into some discrepancies in their testimony, and we have the testimony of numerous FBI Agents who took the stand here and testified to certain happenings on the day that the defendant was taken into custody in January of 1956.

Now, mind you, these are trained investigators. These are men trained to make observations. These are men who make investigations, and we like to think that the FBI is one of the finest investigative bodies in the world.

But what was the condition that we found from the witness stand when those men testified as to the circumstances under which this man was taken into custody?
676 Well, first, we had Agent Hunter. Agent Hunter testified he was one of the first to arrive at the scene. What time did he arrive? He arrived at 2:30 in the afternoon. Who was he with? He was with Agent Connolly. Who was in charge of the investigation? Agent Wolf.

Then we find when Agent Connolly takes the stand that he was one of the first to arrive. But what time did he arrive? He arrived at 10 o'clock in the morning.

Then again, we have the testimony of Agent Hunter again. Was Agent Spencer in the apartment at the time the search was made? Yes, he was.

Later from another agent, was Agent Spencer in the apartment? No, he was not.

Now, I only point those things out to you, and I only bring them to your attention to bring home to you the idea that all is not such as the prosecution would have you believe in this case.

Again, of course, we get down to the facts about
where they talk about the finding of the heel mark
677 in the bank. Of course, they did have investigative
techniques which would dicate that they made photographs of that heel mark, and they sent it to Washington to be examined by one of their experts. And their expert came out here and he put on a demonstration for you.

But upon being cross-examined concerning the areas of the heel, the particular heel in question which he examined and which he demonstrated to you here, we find that he took and made pictures and made enlargements of only certain portions of that heel. And we find the comparisons he made in connection with the portions of of the heel that he took the pictures of, and the heel that was in question here, and that those were only around the part of the heel on which the name was engraved.

We find further on cross-examination of him that those heels were made from molds, and there were, as far as he knew, maybe, millions of such heels in existence. And as far as he knew, although he said he didn't believe those markings were from molds or from defects in the mold, still the possibility does exist, and it is not
the type of evidence that the Government or the
678 prosecution would have you to believe is so positive.

It is so positive because they brought an expert here from Washington to demonstrate that to you. But it is only something that you folks might consider.

I will call your attention when you examine those heels, those shoes, when you go to your jury room to reach your verdict here, you will find on those heels many marks,

many marks which we think are distinctive, or more distinctive because they are obviously mold markings which could be only the heel such as was found in the circumstances under which this heel was found, and there are statements that this heel was the heel that made the imprint in the bank, that those markings would be much more telltale if those were the markings upon which the comparison was made.

Now, the defendant took the stand here in his own behalf. He testified as a witness and you will be instructed that you are to consider his testimony even though he is the defendant, as any other witness in the case. He told the story of his activities on November 4th the
679 day that the bank robbery occurred.

Now, I want you folks to examine in your own minds and in your own thinking, in connection with the activities that were described by him that he went through that day. It was the day he moved.

Now, I think most all of us have moved once or twice or more, maybe, in our lives, and I want you to think about the things that he did that day and the occurrences and happenings, and then decide in your own minds and decide for yourself whether or not it would be ordinary and natural what a person does on the day he moves.

The first thing he does—mind you, now, this is a man that the Government would have you believe was a participant in an armed bank robbery of a bank, on this very day, this very evening.

The first thing he did was the day before make arrangements to have the mover come. That is an ordinary natural thing that any one of us would do on a moving day. That is the natural thing that we would do.

Then in the morning—and again this is a circum-
680 stance which we think is quite significant and which we want you to take into consideration—on the

morning of the day moved he visited the bank with his wife. His wife from whom he had been estranged some three or four years, I believe. They withdrew from the bank on that morning, and the Government would have you believe that he robbed in the bank in the evening, they withdrew $1800.

He then made an arrangement with a friend of his to come and help him and assist him with the moving of some of his personal things. I know we have all gone through that experience of moving because there are certain things we don't like to trust to the movers. There are certain things we like to take care of ourselves. We don't want to turn them over to just the ordinary movers.

He had a friend of his to come and assist him in moving some of those personal things.

Then the mover arrived at his house. This is uncontroverted testimony. The mover testified that he did move as far as this day was concerned for him. They
681 loaded the furniture and took it to this new apartment that they were going to move in. That, again, is uncontroverted testimony.

When upon arrival at the apartment they started to move in the things. He left for awhile to go visit his wife because one of his children she had told him was sick and he wanted to see how the child was getting along.

Then he returned later that evening, paid off the mover. After sitting in the house for awhile when the mother of the girl he was going with and her daughter, another daughter came over to the house. A very natural thing. The Government would have you believe that this is a fabricated story.

Now, how many times in your own life if you have daughters or sons and they were moving—you ladies on the jury here—have you gone on the moving day to their

house to assist them in their moving, and have you brought them some little item of food or something to help them along because you felt the commotion of moving and that, that they wouldn't be able to eat or wouldn't have anything to eat there and you thought
682 you would help them out and brought some along?

You heard that woman testify to that from this stand.

What motive would she have to fabricate that story? That is natural. That is the ordinary thing that would happen, and I am sure it has happened in all of your lives.

After they were there for a short time, they decided to go across the street to the show, and the four of them went across the street to the show, and they stayed in that show for a period of time which has been estimated from, oh, around 5 to 5:30 until 9 or 9:30 in the evening.

Now, I ask you to consider this in your own minds and in your own hearts as to whether or not those activities were such as were not the normal activities of any normal people when such a day as has been described to you here. Then to think that the Government would have you believe that that woman and her daughter would take the stand here and—they would have you believe they were lying, and say that is not what occurred on that day.

Now, what have they produced in opposition to
683 that? The testimony of the cashier at the theatre who said that of all the customers who go in and out of that theatre day after day, day in and day out, she was able to recognize, first, the girl friend of the defendant here, and then later the defendant.

When she was talking about things that are incredible and things which just can't be believed, those are the kind of things that strike me, and I know they must

strike you as being things which are just unbelievable. People who reach out in an effort to cooperate and will tell a story, and once they have told the story they are stuck with it, and then they will begin to tell their story again and again, and after they have told it awhile then they begin to think they have lived that story.

Ladies and Gentlemen of the Jury, we the defense here believe that the Government, the prosecution in this case has failed completely in their burden here; in their burden to prove that the defendant in any way or in any manner had anything to do with the robbery of that bank, and upon that duty, and upon the knowledge
684 that we know you folks will have, what your duty is in this case I know you are going to bring back a verdict in this case of not guilty.

Thank you.

The Court: All right, Mr. Green.

Mr. Green: Ladies and Gentlemen of the Jury: At the risk of, and probably certainly repeating much that has been said by Mr. Gorman who has preceded me, I want to bring several things to your attention in your consideration of this matter.

You are about to embark upon what is probably the most important duty of a citizen, your capacity as jurors to determine the guilt or innocence of an accused.

685 It is your duty to find the facts. It is your sworn duty to apply the law as that law is given you by Judge Igoe at the conclusion of these remarks.

When you were selected as jurors you disavowed passion, prejudice, hatred, discrimination. Under your oaths you gave us your solemn assurance that you would pass upon this case as a matter of law, that you wouldn't divorce yourself from the evidence, and from the law, because of personal animosities, because of any prejudice which you might feel against any person.

Now in this case we have had as a defendant here a man who has not led the best life. We have a man who has been twice sentenced to the penitentiary because of larcenies which he has committed. We have here a man who it is admitted from the evidence is living separate and apart from his lawful wife, although he does support his three children, living with another woman under a name other than his own.

A man whose own wife, according to the evidence,
686 habitually has in her own home men other than her husband. We are dealing with a segment of society that not all of us are acquainted with. But we are dealing with that under the law. We live in a remarkably good country. In our country we have got one law. That law applies with equal force to all those of us who have the misfortune of convictions, as well as to those of us whose past life has been guiltless. We don't have one law for the good, and another law for those we choose to call bad. We don't have one set of rules for those who because of environment or other considerations of life have been cast possibly in a different mold than those of us who have been more fortunate. We have one law, and that law is that anyone accused of crime is presumed to be innocent until his guilt is established by competent and legal evidence. That will be told you by Judge Igoe, it must be established beyond all reasonable doubt. There is no burden upon us of the defense to prove the innocence of any person. The burden rests upon the prosecution to prove his guilt,
687 and there it must reside. To prove it how? As Mr. McGarr said, to prove it by inference? No. We can't speculate. We can't guess. We can't surmise. We can't say, "I don't like the looks of the fellow. He looks like the type of fellow that might do that thing."

Where is the proof?

Where is the evidence?

And if you ladies and gentlemen find that proof and evidence lacking, it is your duty, under your oath, to return the appropriate verdict.

Naturally, ladies and gentlemen, if this man was the leader of a Boy Scout Troop he wouldn't be brought into this court; if he was an industrial salesman, or if he was a warehouseman, or if he was a doctor, or if he was a real estate man, he wouldn't be brought into this court.

He was brought into this court for the very consideration upon which the Government now expects you to say, "Well, it seems like to me he might be guilty, and we, therefore, would so hold."

688 Let us look at the case, let us look at the evidence.

What has the Government shown here?

For the greater part of the time that this case has been going on they showed exactly this, that one day, approximately two and one-half months after the robbery of the Maywood-Proviso State Bank the defendant, Nicholas Guido, went to the Sears Roebuck store at Harlem and North Avenue and there in three departments spent five $2 bills, and there was never any dispute about this, and there was never any contest about this, came from the bank that was robbed and were in the bank that was robbed on the night of the robbery. He had five $2 bills.

What is the next part of their case? This is all.

The next part of their case is that there was found on counter No. 3 a heel print which they contend corresponds with the heel on one of the shoes which was found in the apartment occupied by Guido's wife.

The third thing that was thrown in this morning, 689 and this was argued by Mr. McGarr briefly, was that at the time he was questioned he did make admittedly false statements to the Federal Bureau people about entirely immaterial matters, but according to his own testimony it was not denied in any way, by the Agents of the Federal Bureau of Investigation. After he found

out the nature of the investigation he then told them the truth. Although initially he had given them the wrong name and the wrong address and the wrong relationship with his wife.

Now, let us take a look at that evidence. Let us look at that evidence and see if this is the sort of stuff of which convictions are made. Is this the sort of stuff upon which you would be asked to return a verdict beyond any reasonable doubt?

As far as the bills are concerned, we have five new $2 bills. I believe the court will instruct you that in order for those things to be considered the possession must be recent. I merely submit to you in this matter, is the possession of such money two and one-half months
690 after the commission of the crime recent, in view of the currency with which money moves?

More important, however, I believe the court will instruct you that the law is it can be considered by you that such possession of property which was stolen only sticks if it is unexplained.

Now, what is the story on that?

According to the testimony of Mr. Guido, and there is not one whit of evidence in the record in denial of this, this money was obtained by him in payment of a gambling debt that was contracted by Jimmie de Angelo prior to the time of the robbery. Although the payment was made thereafter.

Now, if that was not so, if there were no Jimmie de Angelo, the telephone number he gave on that stand wouldn't check out, don't you think that the Federal Bureau of Investigation, the greatest of all investigative agencies with the resources at its command would have disproved that forty-three ways for you in rebuttal? Of course they would. Of course they would.
691 Mr. McGarr said he didn't know where he got them; didn't know when he got the bills.

Well, according to my recollection of the testimony, and I submit it is the same as yours, he testified he got the bills sometime in the middle of November.

I don't think there is anything peculiar about that, or anything strange about that.

Mr. McGarr said he kept them because he was worried about spending them.

All right, that is the most remarkable comment I have heard in this case. If he had been worried about spending them, these are brand new $2 bills in numerical sequence, do you think a bank robber would have spent them at all. Do you think he would have risked his life and his future in spending some $2 bills new $2 bills which obviously could be traced? I submit that to you as being something inherently unbelievable.

He tries to belittle the corroboration which was given by Mr. James Rochford of the gambling game. He
692 only saw one of the card games, he didn't see the other one. It was a matter that was a long time ago and you can't have witnesses to prove every facet of everything. He said that Mr. Rochford didn't see any $2 bills being passed. Well, I think that must have been unintentional on the part of Mr. McGarr because the gambling game to which Mr. Rochford testified took place prior to the date of the robbery of the bank. That game took place sometime late in the month of October. I don't understand why that question was asked by the prosecution.

Now a matter which will be argued doubtlessly by the Government is why Mr. de Angelo gave him some money, and in that money there were $2 bills, didn't you, Mr. Guido, go immediately to the Federal Bureau of Investigation and say, "You have got me all wrong, boys, the money I got I got from Jimmie de Angelo." Yet Mr. McGarr is going to tell you that would have been a ready answer

and he wouldn't have been on trial here today. Why didn't he do just that?

693 Well, I don't know whether Jimmie de Angelo is a bank robber or not. I don't know whether Mr. Guido knows whether Jimmie de Angelo is a bank robber or not. But I do know that you ladies and gentlemen of the jury when you come here to serve you are not supposed to check your common sense at that door. You are supposed to take your normal experience and your knowledge to that jury room. That is what we all have, normal experience and knowledge in the course of our lives. You are supposed to take that into the jury room with you.

I am just as positive as the fourteen of you people sitting there in that box right now that had Mr. Guido gone to the Federal Bureau of Investigation and said, "I got these bills from Mr. de Angelo," and if Mr. de Angelo had been a bank robber, or a member of the party, or even possibly if he had not, then Mr. Guido's next public appearance wouldn't be in this court room receiving a trial before an American jury. It would be far more apt his next public appearance would be when somebody

694 opened up a trunk lid of an automobile. Those are the facts of life. That is what would have happened.

No, de Angelo said, "Think nothing of it." What more he said, we don't know. Until the date of trial approached. Until the date of trial approached when he left this man to shift for his own as best he could.

I submit to you that not only have the $2 bills been explained to you but there has also been explained the entirety of the approximate $1,000 that was paid to him by de Angelo.

I call your attention again to the fact that in making the explanation the law does not require that we prove this explanation. The law requires the burden to be upon

the Government and upon the Government it remains and if the explanation as given by the accused is sufficient, and I believe you will be so instructed by his Honor, to raise in your minds a reasonable doubt, the law requires you to give the defendant the benefit of such doubt and to acquit him.

Now, what is the only evidence in this case besides those bills? And this is all there is in the case. There is a
695 left heel print which was found on counter No. 3.

Now, whether or not that heel print, and this was an Essex heel, a heel in general use, not according to the experts the most popular or least popular, but a heel which is used in the millions, is one of the same as the heel print on the shoe which was taken from his wife's apartment, I am not prepared to argue and I don't think this jury will know.

There are some interesting things about it. It is a molded heel. The heel comes out of a mold and it would have the same strivations and same markings. You will have this in the jury room and you will look at it. It will be interesting to make your own conjecture on this as to what that shows.

Another thing that I thought was quite interesting was the fact that the expert, the Government's expert selected out of I think eleven photographs which are in Government's Exhibit 4 for identification, three for the purpose of blowing up, and it is obvious when you look at the shoe that in the instep there are certain dis-
696 tinctive markings. I think those marks distinctly appear on some of the negatives which you will take into the jury room with you, and for one reason or another the Government did not see fit to blow up these for their comparison. I am not an expert. You people are not experts, but we can both look and draw our own con-

clusions. I don't know whether or not it is the same heel print or not, and I am not prepared to argue it.

But I do know this, this I do know, and I think you ladies and gentlemen of the jury know it, that that is not proved to be the shoe of the defendant Nicholas Guido. That fact has not been established in any manner. All that has been established is that that shoe came out of an apartment in which the estranged wife of the defendant was living, along with some other shoes, and in an apartment in which there were men frequented, and most significant, and most significant, who were these men? Among them were two of the men engaged in the card game. one of them was Jimmie de Angelo.

Mr. McGarr has stated that the defendant was shown
697 the shoes, according to the testimony of one of the Federal Bureau of Investigation Agents—and I remember this to be correct—said "Take anything you want." As I remember the testimony he said, "It could be." And Mr. McGarr said, "It might be." I don't know which it was. It was one or the other.

Now No. 1, at that time the defendant was under arrest. He was under no obligation to say, or admit anything, or do anything.

And more striking, No. 2, two of Mr. McGarr's Agents, two of Mr. McGarr's witnesses, did not say that; did not go that far. They said he wouldn't say anything, which also was well within his rights.

Furthermore, this was well within something that you and I know which probably transpired. Had this been damaging evidence, had this been shoes that would have been as convicting as Mr. McGarr would have you to believe they would have been, then there would have been something. But now, and more important, I want to
698 call your attention to an important item of proof which might have been available but which was not

given. Those things can be more significant than the matters proved. Mr. Guido was arrested. Mr. Guido was taken to the Federal Bureau of Investigation. These shoes were there. Mr. Guido was there. Those shoes would fit his feet or they wouldn't fit his feet. If they wouldn't fit his feet, they certainly could not have been his shoes. If they would have fit his feet, they might or might not have been his shoes.

Here we have the greatest investigative agency in the world. They could have required him to put those on; could have required a lawful demonstration. Yet, that was not performed by them. But they ask you to believe beyond all reasonable doubt that they were his shoes.

He was on the stand here yesterday. And the shoes were here in court. He was subjected to a thorough cross examination of over an hour and a half. He is a very competent and capable prosecutor, Mr. McGarr. But the shoes were not tried on here. The shoes were not tried on
699 before you people here, before the jury. Whether or not his feet would go in those shoes or not is something I don't know. Maybe they will. Possibly they won't. You are entitled to that much, you ladies and gentlemen, before you are asked by the Government to say beyond a reasonable doubt that this man is guilty. That is common, simple, elementary basic proof and evidence to which any juror is entitled.

I want to say something else about this, reverting for the moment from my consideration of the shoes. I think the court will instruct you that Mr. Guido stands on trial for the crime of robbery of this bank. He does not stand on trial for anything else. I have already spoken about his previous convictions and I have already spoken about his way of life. He doesn't stand on trial for that. But also, he does not stand on trial for another thing which is a federal crime, that is the possession of money stolen

from a bank that the Federal Insurance Corporation knowing the same to have been stolen. That too is a federal
700 crime. If that is his guilt, his guilt should be so limited and he cannot be found guilty under the existing indictment. Rather, let the Government bring in an indictment, or bring a prosecution for the possession of such money as they believe that such is the fact.

Well, as I said, there is no obligation for us to prove the money. The obligation that the case has stands on the part of the Government to prove its case from its own evidence.

The court will tell you that simply because a man is a defendant does not make him unworthy of belief. He is entitled to testify, the same as any other witness, and you should consider his evidence, considering only his convictions which in your opinion may affect his credibility. But was his account limited to himself? No.

He had the testimony of Mrs. Binnie, Mrs. Guzy, placing him at the time of that robbery in a theatre.

He had the testimony of his friend, Joseph Spagnoli, merely a friend, as to the note that was found.

701 He had the testimony of a disinterested person, the mover who moved him and who placed him there until five o'clock. There was no motive for this at all. On the very day the bank some distance away was robbed at 6:15, we have here the more important thing, the evidence of his signature, subpoena from the bank showing the withdrawal on the very day of the robbery of $1800. He has the receipt book of the real estate office, which is in evidence, showing the payment of the fund on that day for the moving. Mr. McGarr, of course, asks you to believe that Mrs. Binnie, Mrs. Guzy, Mr. Spagnoli, and the defendant, they are all lying. He asks you to throw that all out. Take the somewhat strange word of this theatrical

sort of witness who came in here yesterday and asks you to destroy those people. He asks you to throw it all out.

Well, you can't throw out this documentary evidence. But more important, you can't throw out your common sense. According to Mr. McGarr's admission the testimony of Mr. Waddy places him in that apartment as late
702 as five o'clock.

It would be mighty extraordinary if a person was going out to commit a major crime—I am not going to argue that the crime of bank robbery is a major crime, a crime that is committed by, to use the word, the elite of the criminal world. It is very carefully worked out and planned.

Do you think it would be normal for a man to be at one place at approximately five o'clock, and say, "Oh, excuse me, I have got to go out and rob a bank. I had better get along."

Yet Mr. McGarr is asking you to believe that beyond a reasonable doubt. That is what he is asking you to believe. It don't add up.

I was very much interested in the testimony of Miss Murphy, the young lady who acted to assist the Government. I don't know why things like that happen. She came into court and said that Friday nights are not very busy nights in the theatre. She retreated from that when she was asked whether or not the books and records
703 of the theatre would bear her out, and then she continued along with her story. She made quite a production out of the whole thing. She was able to remember this instance quite clearly, although it was called to her attention almost a month afterwards. She remembered it quite clearly. She didn't remember the day, but she remembered something else the day before which helped her remember it. She was able to identify the defendant quite well. She said only two hundred people came to the

Roxy Theatre a day, although you and I know that if only two hundred people came to the Roxy Theatre, she wouldn't still be working for them because it wouldn't be in existence.

She was very anxious to help. I don't understand people like that. I don't understand people, although their testimony isn't in dispute, like Miss Harris, the head cashier at Sears who took the stand and said under oath that she got bills that were utterly black, simply because she thought that was what she should do. I don't understand people like that. It doesn't make any difference. That
704 testimony isn't arguable. We are not in any way disputing it.

I don't understand people like Mrs. Peifer, who took the stand under oath and stated she was able to recognize certain numbers, 4700, 4,000 and something, 5,000 and some, and 150. They were placed by her on the top of a pack of bills because of the way she made the 1's, 0's and 5's. Those are things that can't be done. You and I also know the indictment here is for robbing a bank of about $21,000. Yet she said she put those figures on top of four various stacks of bills, and she gave the numbers and amounts, and if you add it up it will amount to $40,000. She not only was able to recognize those figures, but remember putting them down. I don't understand people like that.

I don't understand people like Mrs. McFeely, the lady from Sears. There is not any dispute on the testimony here. But Mrs. McFeely before she took the stand here met Mr. Guido in the corridor and asked him, "Are
705 you in the Sears case?"

"Are you here on the Sears case?"

Lo and behold, he was the defendant. He was the man she was brought down here to identify.

Now, those are the things that we have got to face. Yes, we have got to face it against the formidable array of evidence which we have produced. You have got the theatrical Miss Murphy with the remarkable and unbelievable recollection of the acts, they say they will take her and take her against everything you have got, and I don't have any reasonable doubt about it.

Ladies and gentlemen, I don't know what you may think of the defendant as a person. But I know he is entitled to all of the rules of our law. And I know we couldn't convict a yellow dog on the testimony which the Government is now asking you to take away this man's liberty. This is a great investigative organization, the Federal Bureau of Investigation. They have all of their laboratories and everything. What did they come up with here?
706 They have come up with nothing.

I ask you to follow your hearts and bring the only verdict that you can.

Thank you, ladies and gentlemen of the jury.

The Court: All right, Mr. McGarr.

And thereupon Mr. McGarr addressed the jury in closing argument on behalf of the Government, as follows:

Mr. McGarr: Ladies and gentlemen of the jury, logic in a case of this type is not compatible with emotion. Miss Dollie Murphy's testimony doesn't become any less believable because he attaches the adjectives of theatricals to her name.

The arguments of the defendant become no more logical because they are delivered in an emotional manner.

We are here to consider facts. And as I say, the consideration of facts is hindered by the injections of emotions into this picture, and I think such emotions could be disregarded.

707 Let me address myself first to the question that was emphasized greatly as to why the shoes were

not put upon the defendant in the office of the Federal Bureau of Investigation. Do you think the defendant would have agreed to that?

Mr. Green: If the Court please, the law is that the defendant would be compelled to agree to that, and I don't want the argument to be made that he would not agree to it because that is the law as we know it to be.

The Court: Well—

Mr. McGarr: I think I am entitled to go into that matter, your Honor.

Mr. Green: I think he is entitled to argue it but not to say he would not agree to it because the defendant would have had to agree to it.

Mr. McGarr: I am not saying he wouldn't. I am asking the jury to draw their conclusion as to whether we might or might not have.

Mr. Green: He would have had to.

The Court: You say he would have to?

Mr. Green. Yes, he has to. He must permit a 708 comparison.

Mr. McGarr: And if he refused, what would be the consequences?

Mr. Green: Because the consequences would be—well, I have the authorities on that. That is my offer. I don't think there is any dispute on that.

The Court: Well, let us argue about the facts in here without these legal implications.

Mr. McGarr: Well, of course, I am at a disadvantage because it has already been raised to my disadvantage. That is the difficulty I face.

Mr. Green: If it becomes important, I would be willing to submit to the court an instruction for the court to submit as to the law, concerning the defendant about the shoe prints.

The Court: I don't know if that is the law or not.

Mr. Green: I am sure it is the law.

The Court: I am not so sure it is the law.

Proceed, Mr. McGarr.

Mr. McGarr: Assume the defendant did not agree, could you see how he could have been forced to put
709 on these shoes without subjecting to such physical abuse as might have been cause for complaint which his attorneys would be the first to complain?

Suppose the defendant was asked to put on the shoes in court and he did put them on, and they fit him tightly or they were too loose. Do you think you sitting in the jury box could have told whether they were a good fit or not?

We have before us a case where witnesses have told conflicting stories. You are the primary judge of the credibility of these witnesses. You may believe or disbelieve any of the Government's witnesses. You may believe or disbelieve any of the defense's witnesses. But in determining the weight to be given to the testimony of the various witnesses you may consider certain things and the court will instruct you that you may.

For instance, you may consider and determine the credibility which you will give to the testimony of the defendant Guido, his previous felony convictions, in
710 determining the credibility you will give to Mrs. Binnie, Patricia Nugent's mother, and Patricia's sister, you may take into consideration their relationship to the defendant Guido. And I don't mean relationship in the sense that they are related to him by blood, but merely their relationship to Patricia Nugent whom we have had identified as the girl Guido was living with.

You may consider what relationships the Sears people have to the defendant or to the Government. None, of course.

You may consider what relationship the bank people have in their testimony, as to what possible motive they might have for testifying falsely before this court. Mrs. McFeely and Mrs. Herr have been criticized, and why? What relationship has their testimony, or what possible purpose would they have for lying in this testimony, and this they lived when they said Guido was in Sears' store and spent these bills, did they? Obviously not, since Guido has admitted that, and his counsel has admitted it in the final argument.

711 So, despite the considerable criticism heaped upon these witnesses, the defense concludes that criticism by admitting that the facts concerning Guido to which they testified were true.

Of course, even if we were not to believe these people from the Sears store how do we explain away the fingerprints on the bills? How do we explain away the license number, the copies at the gas station, or the defendant's admission from the stand that he was in that store?

What purpose is served by arguing that the testimony of Mrs. Hurley and Mrs. McFeely are inherently incredible, and their admitting what they told is the truth, as it obviously is, indicated by other evidence.

Talking about the testimony of the FBI Agents, and there were several in the apartment of Guido's at the time of the search. There has been an attempt to exaggerate and explain some minor discrepancies or assumed discrepancies in their testimony of these Agents. Who
712 was in charge? We heard one thing from one witness and another thing from another witness. But we also heard there was one man in charge of the evidence. There was another man in charge of the search, and there was another man in charge of the overall investigation. So the characterization of different people as being in charge is certainly no serious discrepancy.

Was Ross Spencer the FBI Agent there, or wasn't he there? One Agent said he was and another Agent says he wasn't. I assume that the Agent who says he was is telling the truth and he was there. The Agent who says he wasn't didn't see him there. Does that indicate that anybody is lying, or that we have an essential falsehood being told with regard to any essential facts in the case? Or does it mean that there are minor and trivial discrepancies in human observation as we always find? The man testified as to the heel print. We have had his testimony commented on at length. And the most important aspect of that comment is that he said they used only certain portions of the heel. You will recall that he said they
713 took eleven photographs of the heel and he picked, not three for any special reason other than he picked the three to blow as they seemed to him to be the most representative of the eleven, and he made his identification not on the defects in the heel, but as he said, on the cuts and abrasions which resulted from wear.

And when counsel for the defense tried to develop the concept in examining him that these defects might be in the mold that made the heel and, therefore, would be found in every Essex heel, he said, "No, these are defects which come from cuts and abrasions due to wear." And when he was asked, "How do you know? Have you examined other Essex heels?" he said, "Yes."

"Where have you examined them?"

"I have examined the other heel of the other shoe. That did not have the same defects and abrasions on it as it would have had if those defects had been in the mold, rather than resulting from wear."

Why were only certain portions of the heel exhibited in the photographs? Because the several cuts and
714 abrasions that are characteristic of wear marks, which the expert testified to were centered around the word

"Essex" on the heel where they were most easily discernible. And he concentrated on that area of the heel in blowing up the picture.

And when he was asked about the irregularities on the instep step side of the heel he said that he had observed; that in the photograph or the negatives which he had examined it was not sufficiently clear that he cared to make any identification from those irregularities. Does that cast any doubt or any aspersions upon the positive identification he made from the cuts and abrasions and other wear marks in the area of the word "Essex"?

Does it mean he was not testifying fully and truthfully when he refused to make an identification from other irregularities because they were not clear enough? Or does that not indicate rather he was testifying as honestly as we might expect he was in refusing to try to make an identification of an area where he was uncertain. Was he positive that heel mark on that shoe made the print 715 which was photograph from the counter in the bank.

He did not equivocate. He said he was. He pointed out the reasons why.

You will take the charts and the heel, and the photographs into the jury room, and you will be able to retrace in your own minds his testimony and the demonstration he made during his testimony.

The defendant on the stand detailed an extensive story of his movements on November 4th, and as counsel said, he did the natural thing that a man does. He moved. He moved and visited his estranged wife and so forth.

Let us see, first, whether these were the natural things that a man does:

First, he visited his estranged wife, according to his testimony, and he picked her up and took her to the Sears Bank, using her signature to assist him in withdrawing from the joint account $1800 of what he characterized as her money.

He then took her home and stayed with her for a while before he left. Yet, a short time later on the same
716 day he revisited her for the purpose of seeing the sick child.

So, here is a man who has visited the home of his estranged wife for a period of probably, as he characterized it, first, as an hour, and then later perhaps half an hour, twice in the same day, on the day he moved. We have all moved. Have you gone out socially on the day you moved to visit people while you were moving? Did you leave while the movers were still in the house? Did you ever go to a movie on the night of the day you moved?

This man was not doing the normal things a person does, but I might venture to say—perhaps I am wasting time on this because it is not consequential. It doesn't matter what he did in the morning and in the afternoon of the day the Maywood Bank was robbed. The important thing is what he did at 6:15 or 6:20 and thereafter of the day that the bank was robbed. And whether he moved that day or whether he went to the real estate office, or whether he visited his wife, or whether he withdrew money from the bank at some time around eleven in the
717 morning or three in the afternoon doesn't mean a thing.

We come now to Dollie Murphy, and there is much speculation as to how of all of the customers that went in and out of the Roxy Theatre she was able to recognize Guido and the girl, Patricia Nugent. Well, I think the answer is something that is common to all of us in our everyday observation. We notice people walking down the street in the Loop, hundreds of them, and we could never remember them again because we don't pay any particular attention. But if some one of them does something unusual which calls our attention to them, then we rivet our attention upon them, and we take cognizance of them, and we can remember them.

How many times do you think as Dollie Murphy sat in that cashier's cage that she saw a patron of the theatre go out of the theatre, cross the street, come back in, go out again, come back in? How many times do you think that as she sat in that cashier's chair she had a man come up to her, buy a ticket, and have a girl run across the
street to talk to him, and him come back, turn in his
718 ticket and get a refund, and then turn around and
say, "To heck with it, I am going in anyway," and buy another ticket and walk in. Why wouldn't she remember those things? How often do you think those things might occur?

And notice too, there are two very important aspects of Dollie Murphy's testimony. She did not come into court a year or a year and a half after the occurrence and identify the defendant Guido. She identified him within a month of that occurrence.

And notice too that she was not shown a picture of Nicholas Guido and asked, "Is this the man?" and she said, "Yes." Do you recall her testimony that she picked Guido's picture out of several pictures of different men.

And I do not agree with counsel that she testified concerning the business of the theatre, and a Friday night was a dull night and then later changed her story. I think she said from the beginning that Saturdays and Sundays were the busiest, and Wednesday nights next, and then
Friday night came the fourth. I don't recall if she
719 ever changed her mind or contradicted that.

We have characterized as a man supporting his wife and three children, despite the fact that other men visited her home, the defendant Nicholas Guido.

The only evidence that he gives them any money is the fact, according to his testimony, that some of the $90 which he had in his pocket the day he was arrested was going to be given to his wife as support money.

On the other side of the coin we find him withdrawing in a period of two months nearly $4,000 from their joint bank account. But all of this, once again, is beside the point.

The defense would create in your mind the inference that Jimmie de Angelo robbed the Maywood Bank, and that Jimmie de Angelo gave Guido the $2 bills and, therefore, Guido was left the innocent victim of the accusation of a bank robbery because he was holding some money that was stolen from the bank.

Now, first, it is the duty of the Government, as Mr. Green said, to prove beyond a reasonable doubt the
720 guilt of the defendant. We are not shirking from that duty. We contend that we have met that burden beyond any doubt whatsoever, any reasonable doubt.

The use of Jimmie de Angelo to raise such a doubt in your mind must be such that you believe, or attach some credibility to the Jimmie de Angelo story.

The question was asked, "Why was Guido brought into court?"

He is brought into court simply because the evidence you have heard against him indicates he robbed the Maywood Bank. And to say that another man did it without any more proof than this, that Guido takes the stand and says, "Sometime about ten days after a card game in late October—" which takes us, you will notice, very close to the day of the bank robbery—"Jimmie de Angelo paid off a gambling debt to me, and among the money I got from him were some $2 bills, and I don't quite know where I had it after that but I finally spent it at the Sears store about two and one-half months later because I thought it was bad luck to hold onto them."

721 Where is Jimmie de Angelo?

"He agreed to come to testify but now I can't find him. But I have got the phone number of his wife, who doesn't know where he is."

Now, Mr. Green urges you to consider that that places upon the Government the burden to find or produce Jimmie de Angelo.

I am not sure that Jimmie de Angelo exists, and if he does exist, I am not at all sure he ever had any $2 bills or was ever in any card game.

Finally, I am not at all sure he participated in or had anything to do with the Maywood Bank because, as Guido told us, this fanciful Jimmie de Angelo got the money in Calumet City.

The point I am making is that any defendant who takes the stand can explain his actions in one way or another. The fact that he explains them does not necessarily mean that you have to believe them. And only if you believe him are you entitled to take the evidence he produced into account in determining whether it raises in your mind
722 a reasonable doubt. But it was not Jimmie de Angelo who left the heel print in the Maywood-Proviso State Bank.

The degree of estrangement of Guido's wife has been emphasized in argument to indicate that, perhaps, she is living with another man and perhaps that man is de Angelo. But I asked Guido on the stand whether his wife was living with another man, or another man was living in that apartment, and he said, "No" except possibly an uncle who stayed overnight once or twice.

There was no other man. This attempt is purely fanciful to put those shoes into the possession of Jimmie de Angelo and those $2 bills into the possession of Jimmie de Angelo. Nobody does it but Guido himself. That is his story and his story alone. He says he got the $2 bills from de-Angelo. He says that de Angelo was seen at the apartment.

Remember, any defendant can make up a story. The

issue before the jury is whether it is a plausible story or whether it is a believable story.

723 Remember also, that when Guido was shown the shoes Agent Hunter said, "Are these yours?" referring to the shoes and other evidence out on the floor, he said, "They could be" or "They might be" and I am frank to say that my memory is not exact on this as to what word was used either.

Two of the FBI Agents said he wouldn't say anything. There is no indication that they were speaking of the same occurrence which took place when Agent Hunter asked him, referring to the shoes and other items, "Are these yours?" There is no indication that we are speaking of the same instance in that testimony.

Counsel argued that had Guido really been guilty of this bank robbery he would have refuted those shoes knowing that they were damaging evidence against him, and the fact he did not prove his innocence; the fact that he did not or does not prove his innocence, it proves only one thing. Guido did not dream in his wildest dream that there was an identifiable heel print of those shoes on a counter in the bank. He had never heard of

724 such a thing. He had never imagined such a thing, and he could not imagine, as most of us could not imagine at that time how those shoes could possibly incriminate him.

By way of summary, let me point out that the Government has put in the following evidence, and I merely want to give you a cross-picture of it before you to support our contention that we have established beyond a reasonable doubt that Nick Guido participated in the armed robbery of the Maywood Bank.

First, we have his heel print as he climbed out of cage No. 3. He left his heel print there, as I said, and he might

as well have left his name and address because that ties him into it. And if there was any doubt that he was in the bank the night that heel print was left, that doubt has been dissipated when we find the same Guido, admittedly, not by the Government's proof but by his admission, in Sears Roebuck spending money which has been identified beyond any possible doubt that those were the $2 bills that came from the bank.

When you ask Guido when he got those $2 bills, even when he tells the fanciful story about getting them from a guy named de Angelo whom he cannot now find, even the date when he gets them corresponds approximately to the bank robbery which took place on November 4th, and he said he had a card game at the end of October and he won $500 on paper and he collected ten days or two weeks later. Even the date when he gets these bills from the so-called Jimmie de Angelo corresponds with the date when he really got them from the bank.

Finally, before he robbed the bank, and perhaps this is as damaging a piece of evidence as anything that has been presented to you, he tried to set up a false alibi, a story as to where he was the night the bank robbery occurred in case anybody ever asked him. Assisting him in that was his girl friend Patricia Nugent, who sat in the Roxy Theatre from six or shortly afterwards until nine-thirty, leaving the theatre frequently to go across the street, and then coming back in waiting for Guido to arrive, so that they could say that they were at the theatre together all evening. Yet somebody saw him arrive, and saw him arrive not at six or six-fifteen, but at nine or nine-thirty in the evening.

He was in that bank. There (indicating) are the shoes to prove it. He took money out of the bank. There are the $2 bills (indicating) to prove it. He is guilty of the

robbery of the Maywood-Proviso State Bank beyond any reasonable doubt.

Thank you.

The Court: Ladies and gentlemen of the jury, this case comes to you as a result of an indictment which was returned by the grand jury for this district in January, 1956. And that indictment in substance charges as follows:

"That on or about November 4, 1955, at Maywood, Illinois, in the Northern District of Illinois, Eastern Division, Nicholas Guido, defendant, together with other persons unknown to the grand jury, did, by force, violence and intimidation, feloniously take from the presence of the employees of a bank, to wit, the
727 Maywood-Proviso State Bank, 411 Madison Street, Maywood, Illinois, a bank the deposits of which were then and there insured by the Federal Deposit Insurance Corporation, a sum of money, to wit, approximately $21,906.82, which money was then and there in the care, custody, control, management and possession of the aforesaid Maywood-Proviso State Bank.

The January 1956 grand jury further charges that in committing the offense above described, the defendant did put in jeopardy the lives of the employees and customers of the Maywood-Proviso State Bank by the use of a dangerous weapon, to wit, a firearm: all in violation of Section 2113, Title 18, United States Code.

If you believe from all the evidence and beyond a reasonable doubt that the defendant Nicholas Guido was one of the masked individuals who robbed the Maywood-Proviso State Bank on November 4, 1955, and if you further believe that one or more of the persons who robbed
728 said bank carried and displayed a firearm during the robbery and that the deposits of said bank were in-

sured by the Federal Deposit Insurance Corporation, then you shall find the defendant Nicholas Guido guilty as charged in the indictment.

You are further instructed that you have the right to weigh and examine the evidence closely and carefully in the light of the common knowledge and experience of mankind, and you have the right to take into consideration the common knowledge and experience of mankind in determining whether the evidence is reasonable or unreasonable, or probable or improbable, and in determining what weight it is entitled to receive.

You are also instructed you must consider each of the statements which the court makes to you not merely by itself, but as related to all other points covered by the charge. In other words, you must consider this charge as a whole.

You are also instructed that there are two kinds of evidence, direct and circumstantial. Direct evidence is that sort of evidence by which a fact is proved directly and without interference from other facts, and is
729 usually given by witnesses who saw, heard or otherwise observed some particular fact or occurrence. Circumstantial evidence is that sort of evidence by which an inference of an unknown fact is drawn from the existence of known facts. For example, if, when you went to bed at night, you saw the ground was bare of snow, and in the morning when you awakened, you saw the ground covered with snow, while you had not seen the snow fall, nevertheless, you can infer from the evidence you see, that it had snowed during the night. This is an illustration of what circumstantial evidence is.

The law sanctions the conviction whenever there is legal evidence to show the defendant guilty beyond a reasonable doubt, and circumstantial evidence is legal evidence.

The court also instructs the jury, a reasonable doubt is

what the term implies, a doubt founded on reason. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative. It means, simply, an honest doubt that appeals to reason and is
founded upon reason. If after considering all the evi-
730 dence in the case, you have such a doubt in your mind
as would cause you, or any other reasonably prudent person, to pause or hesitate before acting in a grave transaction in your life, then you have such a doubt as the law contemplates as a reasonable doubt.

You have only one duty to perform at the present time and that is to tell the court whether the defendant is guilty or not guilty as charged in the indictment.

Under no circumstances are you to consider the matter of punishment. That is a matter committed to the attention of the court alone.

In weighing a defendant's testimony you may consider that he is the defendant in this case and has a vital interest in the outcome of the trial.

You are also instructed that one method of impeaching a witness is to show his previous conviction of one or more felonies. You have heard evidence of the previous conviction of Nicholas Guido of several felonies. You may take that evidence into consideration in determining the
credibility of the defendant as a witness. However,
731 the evidence of the conviction of the defendant of a
crime other than that charged in the indictment in this case should not be considered by you in any other respect than as bearing upon the credibility of the defendant's testimony.

The burden of proving beyond all reasonable doubt every material allegation necessary to establish the defendant's guilt rests upon the prosecution throughout the trial, and the burden of proof never shifts to the defendant.

The court instructs the jury as a matter of law, that the indictment in this case is no evidence, in the slightest degree, but is a mere formal charge requiring proof of all the material allegations contained therein, by the testimony of witnesses or facts and circumstances. And you are further instructed that the law presumes the defendant to be innocent of the crime charged in the indictment, until he has been proven to be guilty beyond all reasonable doubt; and this presumption of the law of his innocence is no mere idle theory, to be cast aside by the jury through mere caprice, passion or prejudice, but it is a substantial part of the law of the land and follows the defendant
732 throughout the entire case, and must not be lost sight of by the jury until it has been overcome by evidence which establishes the defendant's guilt beyond all reasonable doubt if the evidence in this case leaves upon the minds of the jury any reasonable doubt of the defendant's guilt, the law makes it your duty to acquit him.

You are also instructed that mere probabilities are not sufficient to warrant a conviction; nor is it sufficient that the preponderance of the evidence supports the allegations of the indictment; nor is it sufficient that, upon the doctrine of chances, it is more probable that the defendant is guilty than innocent.

You are also instructed that, if you can reconcile the evidence in this case upon any other reasonable theory or hypothesis than that of this defendant's guilt, it is your duty to do so and acquit the defendant.

The court also instructs the jury that, where a person on trial for a crime shows that he was at another place at
733 the time the act was committed, he is said to prove an alibi. One of the defenses interposed by the defendant in this case is what is known as an alibi, that is, that the defendant was at another place at the time of the commission of the crime. The court instructs the jury that such a

defense is as proper and legitimate as any other, and all the evidence bearing on that point should be carefully considered by the jury. If, in view of all the evidence, the jury have a reasonable doubt as to whether the defendant was not present but was in some other place when the crime was committed, they should give the defendant the benefit of that doubt and find him not guilty. It is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged.

You will remember that when you were examined and later accepted as jurors, the lawyers agreed that you might serve as jurors on the basis of the answers which you then made when you were questioned under oath as to your qualifications. The answers you then made as to those questions in regard to your fairness, your lack of
734 prejudice and freedom from passion are as binding upon you now as they were then, and should remain so until you are finally discharged from further consideration of this case.

During the course of this trial you were permitted to hear evidence relative to the defendant's renting a safety deposit box in the Pioneer Trust & Savings Bank in Chicago on January 14, 1956, and that there was subsequently taken from that box by members of the Federal Bureau of Investigation $3,150. The court hereby instructs you that all evidence relating to this box and the money therein is improper and you are in no way to consider the same in arriving at your verdict and are instructed to disregard it in its entirety.

You are also instructed that in order to warrant a conviction for crime on circumstantial evidence, alone, the circumstances, taken together, should be of a conclusive nature and tendency, leading on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable cer-

tainty that the accused, and no one else, committed the offense charged; and it is the invariable rule of law that
to warrant a conviction upon circumstantial evidence,
735 alone, such facts and circumstances must be shown
as are consistent with the guilt of the party charged, and as cannot, upon any reasonable theory, be true and the party charged be innocent; and in this case, if all the facts and circumstances relied upon by the prosecution to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, then the jury should find the defendant not guilty.

The court also instructs the jury that you are not to consider evidence of other offenses committed by this defendant as tending to prove that it was likely or probable that he committed the offense charged in the indictment in this case.

You should not consider any evidence is arriving at a verdict which you have heard, but which the court has afterwards stricken from the record, nor should you consider any evidence which has been offered and which the court have refused to receive. You are to disregard all statements of witnesses which the court ordered stricken
out, if any. Such statements are not evidence in the
736 case and must not be considered by you. You should
not draw any inference whatever from the fact that attorneys in the case have objected during the progress of the trial to questions asked and answers made by witnesses. It is the right of the attorneys on either side to object to the introduction of testimony. Such objections raise questions of law to be decided by the court only. You should not draw any inference or come to any conclusion as to what your verdict should be merely because of the fact that the court permits you to consider the case.

The court instructs the jury that a defendant is a competent witness in his own behalf; that he differs from other

witnesses only in the fact that he is the defendant charged with the commission of a crime; that such fact may be taken into consideration by the jury in passing upon his credibility, but in other respects his testimony must be treated the same as that of every other witness who has testified in the case and is subject to like tests in determining the reliance to be placed upon it.

The mere fact that the defendant had in his posses-
737 sion property alleged to have been stolen is merely a circumstance tending to show his guilt and should be considered by you only if you further find that such property was in his possession recently after the commission of the robbery. In determining that question the element of time is important but you should also consider the circumstance and the character of the goods, their currency, the ease with which they may be transferred, and other facts and circumstances in evidence.

The mere fact that the defendant had in his possession property alleged to have been stolen should be considered by you only if you also find that such possession by the defendant has not been explained by him in a manner which leaves in your mind a reasonable doubt of his guilt.

The indictment in this case charges the defendant by force, violence and intimidation robbed the Maywood-Proviso State Bank of approximately $21,906.82 and that in such robbery he did put in jeopardy the lives of employees and customers of this bank by the use of a firearm.

The court instructs you that this crime of bank rob-
738 bery is separate and distinct from the crime of possessing property or money knowing the same to have been taken from a bank. The defendant is not now on trial for the crime of possessing property or money knowing the same to have been taken from a bank but is on trial for the crime of robbery. Therefore, even though the evidence may convince you beyond a reasonable doubt

that the defendant is guilty of the crime of possessing property or money knowing the same to have been taken from a bank, you must, nevertheless, find him not guilty unless you are also convinced beyond a reasonable doubt that the defendant did rob such a bank as charged in the indictment.

There are two forms of verdict which you will take with you to the jury room. In the event you find the defendant Nicholas Guido guilty, you will sign this form of verdict:

"We, the jury, find the defendant Nicholas Guido guilty as charged in the indictment."

739 In the event you find the defendant not guilty, you will sign this form of verdict:

"We, the jury, find the defendant, Nicholas Guido, not guilty as charged in the indictment."

That form of verdict, of course, should be signed by your foreman and beneath his or her name should be appended the names of the eleven other jurors.

At this time the two alternate jurors will be discharged. That is Mr. Charles E. Kenney, and Mrs. Fannie G. Marcus. You may retire, and we thank you for the service you have rendered up to the present time.

Mr. Kenney: Thank you.

Mrs. Marcus: Thank you.

(Whereupon the two alternates were discharged.)

The Court: Swear the Marshalls to take charge of the jury.

The Clerk: Will you raise your right hands and be sworn?

The Marshalls: Yes, sir.

(Marshalls duly sworn)

740 (Whereupon the jury retired at 12:20 p.m. to deliberate on the verdict.

The following took place outside of the presence and hearing of the jury.)

Mr. Green: I am still concerned, your Honor, with Government's Exhibit No. 10 which is this fingerprint card. There has been a masking of "criminal specialty, bank robbery," but there has been no masking of "criminal specialty". So the obvious thing is that there is a criminal specialty, and also an FBI number.

The Court: How did you mask the other one?

Mr. McGarr: We put a piece of white card over it.

The Court: Then do the same with this one.

Mr. Green: I don't like the residence being on there, your Honor, "1110 South Austin" which is a matter of evidence. I don't like the "Italian American" on there either. I don't think that is important.

Mr. McGarr: Your Honor, the fact is he gave the information which has already been received in 741 evidence.

I agree as to the FBI number we could take that out. Perhaps the card should be extended past the "criminal specialty".

Mr. Green: There is no dispute about his fingerprints any way, Mr. McGarr.

The Court: I don't see how this would bother you. There is no question but what he is an Italian American, and 1110 South Austin.

Mr. Green: I don't think it should have "criminal specialty" or the "FBI number".

The Court: The "criminal specialty"?

Mr. McGarr: In the printed section.

Mr. Green: It is in the printed section, your Honor.

Mr. McGarr: Right along the masking there.

The Court: Oh.

Mr. McGarr: We could do that right away, if you wish.

The Court: Yes. Do you have some tape here?

Mr. McGarr: No, I haven't but I could run down to the office and do it right away.

And I would agree also, if your Honor thinks the FBI number should be masked we could do that. But I do
742 think the card should go to the jury in whatever form we finally agree on.

The Court: Well, you get your tape and mark out the criminal specialty part of it.

Mr. Green: And the FBI number?

The Court: And the FBI number.

Mr. McGarr: I will do that immediately.

The Court: Now, I take it in so far as the instructions are concerned, it may be considered that after the jury has retired you gentlemen will repeat all of the discussions we had in the chambers this morning, and that may go into the record at the present time.

Mr. Green: They may, your Honor.

Mr. McGarr: Yes, sir.

The Court: Are you going to fix that other exhibit?

Mr. McGarr: Yes, sir.

The Court: Then we had better wait and let all of the exhibits go in at once.

Mr. Green: Yes, sir.

Mr. McGarr: Yes, sir.

The Court: Has he gone down to get the tape?

Mr. McGarr: Yes, sir.

743 The Court: Then you could send all the exhibits in at once.

(Addressing the Marshall:) Don't take the other exhibits yet until we get the last one here.

The Marshall: Yes, sir.

(Whereupon were all the proceedings had an taken in the above-entitled matter on the day above described).

744

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 56 CR 62) • •

Before Judge Michael L. Igoe,
and a Jury.
May 2, 1957
2 o'clock p.m.

Court met pursuant to adjournment.

Present:

Same as before.

745 The Court: Has the jury arrived at a verdict?

The Jury Foreman: Yes, sir, your Honor, we have

The Court: Hand it to the Marshall, please.

The Jury Foreman: Yes, sir.

(Whereupon the Jury Foreman handed the verdict to the Marshall, and the Marshall handed it to the clerk.)

The Court: Read the verdict.

The Clerk: Verdict:

"We, the jury, find the defendant, Nicholas Guido, guilty as charged in the indictment."

It is signed by the foreman and eleven other members of the jury.

The Court: Judgment upon the verdict.

Mr. Gorman: If the Court please, pursuant to the rules of criminal procedure, the defendant now makes a motion for acquittal, and a motion for a new trial, and we will ask that your Honor set it down for a date.

The Court: When do you want it set?

Mr. Gorman: Could it be a week from today?

746 The Court. (Addressing the clerk) How is that?

The Clerk: We couldn't hear it on the 10th, but we could hear it May 13th at ten.

The Court. May 13th at 10 o'clock.

Mr. Gorman: Thank you.

Mr. McGarr: Thank you.

The Court: The jury will be discharged. They won't have to report until tomorrow morning. You are to report up to the jury room tomorrow morning.

The Jury: (In unison) Thank you.

(Whereupon the following took place outside of the presence and hearing of the jury).

The Court: What bond is he under?

Mr. Green: $15,000.00, your Honor.

The Court: That same bond will stand until the motion is served.

Mr. McGarr: No objection.

(Whereupon were all the proceedings had and taken in the above-entitled matter on the dates above described).

747 United States of America
Northern District of Illinois
Eastern Division

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 56 CR 62) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause taken before the Hon. Michael L. Igoe, one of the Judges of said court, without a jury, in his court room in the United States Court House at Chicago, Illinois, on Monday, May 13, 1957, at 10 o'clock a.m.

Appearances:
Hon. Robert Tieken,
U. S. District Attorney, by
Mr. Frank McGarr, and
Mr. Harold Sodergren,
Assistant U. S. District Attorneys,
representing the plaintiff,

Mr. Richard E. Gorman, and
Mr. Joseph E. Green,
representing the defendant.

748 The Clerk: 56-CR-62. United States of America vs. Nicholas Guido. Defendant's motion for judgment of acquittal and for new trial.

Are you ready?

Mr. Green: Yes, sir.

Mr. McGarr. Yes, sir.

The Clerk: We will hold this until 2 o'clock.

(Whereupon further hearing of the above-entitled matter was continued until 2 o'clock of the same day).

749-750

United States of America
Northern District of Illinois
Eastern Division

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 56 CR 62) • •

Before Judge Michael L. Igoe,
without a jury.
May 13, 1957.
2 o'clock a.m.

Court met pursuant to adjournment.

Appearances:
Same as before.

751 The Clerk: 56-CR-62. United States vs. Nicholas Guido. Defendant's motion for judgment of acquittal, and motion for a new trial.

The Court: How much time do you want to spend on this?

Mr. Green: Not long, your Honor.

The Court: I don't want to cut you off. I just want to get an estimate.

Mr. Green: It is not our purpose to review a lot of material that has already been covered during the trial of the case. There are some things I would like to mention, and some few new things we would like to take up. The most I would guess would be 15 minutes. It wouldn't be more than that. That should be more than adequate.

The Court: I suppose the criminal matters are first. Go ahead.

Mr. Green: As I stated to the court, we do not intend to review the numerous matters that were urged during the trial of this case, except possibly to recount them in order that the Court may be better able to gauge the cumulative effect, if any, of the matters which were assigned by objections during the trial.

752 We have first to consider the very unfortunate but most widespread and persuasive publicity which was given to the robbery of the Lincolnwood Bank after the selection of the jury in this case.

I readily concede that when the jurors were interrogated as to the effect of that publicity, although the greater majority of them stated that they had read the same, they stated that in no way would that publicity serve to effect their judgment or render them biased in any way. Scarcely another answer could have been expected of those jurors.

But that publicity did exist and that publicity was widespread, and that publicity came at a most unfortunate time

for the rights of the accused. I don't think that can be successfully denied by the Government.

We want to again call the Court's attention to the character of the search which was conducted at 1110 South Austin Avenue where the shoe which was introduced into evidence as Government's Exhibit 12-B, which was argued
and fitted into the pattern of the shoe at the bank
753 was made, and we very respectfully again submit to
the Court that that search was an illegal search because of, first, the fact that it was a search following an arrest of convenience; that the arrest could well have been made outside of the premises, but the arrest was postponed in order to give an opportunity for the search to be made.

We likewise invite the Court's attention to our contention that the search exceeded the limits of a search permissible under such an arrest.

But more important that the shoe which was evidentiary only was not the type of property that could be taken and now contended to be the means of the commission of the crime. We have been all over that, your Honor.

I don't think, however, that the Court during the trial of the cause was sufficiently impressed by the great volume of admittedly incompetent and improper evidence that was received by the jury relating to the search of a safety deposit box which the defendant rented under an assumed
name, wherein was found $3150 worth of currency.
754 We had there proof before the jury of this consid-
erable sum of money deposited shortly after the commission of the offense. Deposited, moreover, under a fictitious name.

Now, it cannot be argued and it was not argued by the Government, that the fact that rental, and the fact of such a deposit would of and in itself be admissible, only under the theory of recently acquired unexplained wealth

could such a showing be made, no foundation was made therefor. The jury, however, was permitted to receive that. Why? Under the tacit representation by the Government, that they would be able to identify a certain portion of that money, the $3150 as having come from the robbed institution, the Maywood Proviso State Bank. The Government attempted to do so. They attempted to do so by the testimony of one witness whose account the Court found to be patently unbelievable, and through out from the evidence, the money she sought to identify.

They sought to do so again by showing a number of new $10.00 bills in numerical sequence. As to those, the
755 Court held that such was not a sufficient connection and dismissed those from consideration of the jury.

Thus, of the fruits of the search no showing was made whatsoever which would serve to connect that money with the bank. But nevertheless the jury not only heard of the renting of the box and the depositing of a substantial sum of money, but—although this is only an estimate, I would say that 30 per cent of the testimony that was given in this case was given concerning that clearly inadmissible, improper, and prejudicial item.

I respectfully submit to the Court that those matters, considered one in conjunction with the other, with what has always and still does appeal to us to be a very close and circumstantial case, could not have failed to hurt the defendant before the jury.

There are two other matters which have not previously been brought to the attention of the Court, which I wish to urge at this time:

One is the improper rebuttal testimony that was allowed to be heard by the jury. If the Court recalls, an agent
756 of the Federal Bureau of Investigation took the stand upon rebuttal and testified to damaging and arguable incriminating conversations with the defendant which oc-

curred the very day after the robbery of the Maywood Bank. The pretext assigned by the Government counsel for the rebuttal testimony of such agent was that the agent's activities that day would assist the succeeding witness, Miss Murphy, in fixing the date that she saw the defendant. That was the night before. In no way such a conversation would assist her. Had that rebuttal been limited to the activities of the defendant, and the movements of the agent, then such might have been different. But no, we were allowed to have the jury hear the conversation. I respectfully urge, earnestly urge, that I think such was an unfortunate error.

Again, in the final argument, where Counsel for the defendant argued before the jury, and I believe properly, that the Government with its wealth of resources and investigative abilities should have at least allowed the jury, or allowed the shoes, which was such a cogent piece of evidence in the case, to be fitted to the defendant. The argument was made that failing to do so the jury was
757 allowed to draw the inference which naturally flowed therefrom in their consideration.

In reply, Government counsel stated to the jury "We did not do so because it would have been illegal, in effect," as against timely objections to that. Your Honor stated in the hearing of the jury that you did not know but what the position of the Government's attorney was legally correct.

In that connection, your Honor, the case of Hood v. United States, I think it is in 218 U.S., allowed the fitting of a coat, and the Hood case was relied upon by the Government in its argument—that was the Holt case, I beg your pardon, the 218.

So, that was well within the knowledge of the Government at the time that argument was made that such a demonstration might have properly been carried on.

The end result of the Government's argument, defense counsel's objections, and the colloquy which ensued thereafter was that the jury would very properly have accepted
the Government's assurance that they regarded the
758 act of trying on the shoe as being an illegal one, as
being correct, and put the counsel for the defense in the light of being somewhat of a trickster by even so arguing. I think it was very unfortunate, and the result of that, I think, was evident in the jury's verdict.

As I stated to the Court, it was not my purpose to devote a great deal of time to this argument. I very, very earnestly state that I believe that the six errors to which we have made reference indicate that the ends of justice would be served by awarding a new trial in this matter.

Thank you.

The Court: All right, Mr. McGarr.

Mr. McGarr: I believe I can be quite brief, as brief, your Honor, as Mr. Green was.

First as to the issuance of the publicity and the effect it may have had on the jury. The precise issue which was before the Court was the specific radio broadcast in which, according to the testimony produced by the defendant in support of their motion, the defendant Guido having been linked to the Lincolnwood Bank robbery by
conjecture, at least, and upon questioning the jury
759 indicated that none of them had heard that particular
broadcast. That had they heard that broadcast there might have been some question in your Honor's mind. But since they didn't, your Honor ruled, and I think properly, that they had not been unduly influenced by this unfavorable publicity.

The fact that another bank was robbed during the course of the trial, whatever inferences the jury may have drawn from the fact that they knew of that cannot in any way that I can imagine be such as to prejudice him, because a

similar crime was committed while he was being tried. Because except for this radio broadcast there was no indication that any one thought that the defendant Guido was connected with the other bank robbery, and no such implication came to the jury.

I think it would be a ruling that is far reaching and would have disasterous consequences if your Honor was to hold that if a widely publicized similar crime was perpetrated during the course of a trial, with no evidence that the defendant was connected with it, that he could automatically get a mistrial. That would make the ad-
760 ministration of justice rather difficult in the courts.

I don't think there is any foundation or logic for it.

As to the search, I think the evidence demonstrated that it was not a search of convenience, but that it was a search incident to the lawful arrest, which arrest took place at the only place where it possibly could under the circumstances.

Too, without burdening your Honor with the cases law which has been previously argued, I think the Supreme Court's decision on the physical limits of the area of the search, including as they do, the complete search of a 4-room apartment in one case, and the search of entire office, including filing cabinets and the like in another case, and the search of a dwelling in many cases, particularly Ignolia and others from our own 7th Circuit, make it clear that the search of Guido's apartment which was incident to his lawful arrest in the apartment was reasonable.

The case law, once again, which was cited to your Honor during the course of this argument and previously, and once again I will not repeat it because the matter
761 has been argued and passed upon, would indicate that, first, the shoes were properly seized incident to a lawful search.

Secondly, they were within the scope of the things permitted to be seized under the Rule 41 without any doubt.

On the question of the safety deposit box and the money found therein, I indicated to Mr. Green some time in our discussion of the trial that I did not intend to try to introduce the money found in the safety deposit box on the basis of afterward acquiring an unexplained wealth, and I know he realizes that the attempt of the Government to put that safety deposit box and money into evidence was based not on that theory but on the theory it was related to or tied to the bank by a very definite chain of evidence.

Your Honor found that that chain of evidence was too tenuous and excluded that evidence. The Government disagreed with that ruling, of course, or they would not have tried to put it in. But in any event, the jury was instructed to disregard it. It was not argued to the
762 jury, and the defendant could have had another instruction at the termination of the trial had they seen fit, and I think the law is clear that evidentiary items of that type—

Mr. Green: Pardon me, Mr. McGarr. That instruction was also given.

The Court: The instruction was given twice.

Mr. McGarr: Then we have, contrary to my recollection, a double assurance. The jury was instructed to disregard it, and undoubtedly it did, and I am sure that if your Honor found the testimony of the witness so tenuous as to not indicate what it was introducing, that indicates that the jury could not have been unduly influenced by it even if they had not been instructed to disregard it.

The extent of the Government's rebuttal as it related to conversations concerning the defendant Guido, as you recall, took the form of such conversations with the defendant as to where he had spent the previous night, where he had parked his car, and so forth. All circumstances which he testified to on direct, and those con-

versations were introduced by virtue of the FBI
763 agent on rebuttal, not as his primary purpose for taking the stand, but properly because they are related to and tend to rebut the information and testimony which the defendant himself had given while on the stand. His primary purpose for being on the stand was to describe the activities of the defendant on the particular day. His activities, of course, were not incriminating but being in the neighborhood of the theatre and on the street. If they had been incriminating or in any sense connected him with the crime they would have been put on as a part of the Government's case in chief.

They were put on merely to establish that those were the same activities on that day as described by the witness who was the cashier at the movie theatre, in order that the date on which she observed Guido could be established and for no other purpose, to the extent that we went into the conversations, they were for the purpose of rebutting testimony which the defendant had himself given either on direct or cross examination.

Finally, the important point of why the shoe was not
764 tried on which Mr. Green in his closing argument made a rather extended reference to.

I do not recall saying, and I am quite certain I did not say to try the shoe on, or demand the defendant to do so, or to ask the Court to order him to do so would have been illegal. I indicated however, and this is still my state of mind, that I was not sure it would be legal.

I am quite familiar with the Holt case and, as a matter of fact, mentioned it to Mr. Green some time during our discussion after the trial of this matter. However, my view here is that the defendant when he takes the stand waives his privilege against self-incrimination, not in a blanket way but within the limited area within which he chooses to waive it. And that limitation is preserved by

the fact that my cross examination could not exceed his direct testimony. Therefore, anything he did not choose to testify concerning I obviously could not cross examine him on.

But your Honor will recall that in the course of his
765 direct testimony, the shoes were not mentioned once by the defendant. He did not say they were his, or were not his, they did fit or did not fit. Under that circumstance I was not certain then, and I am not certain now, whether I could properly have insisted that he try those shoes on, but I am inclined to believe that I could not.

But in any event, my argument to the jury, and your Honor's remarks were, as I recall quite certainly, and I think your Honor will too, not that it was illegal, to force him to try the shoes on, but that your Honor was not certain whether it was legal or illegal under the circumstances. In my argument to the jury on that point I did not say, nor had your Honor said that it would have been illegal to try the shoes on. I merely said, "If they had been tried on in the FBI Office, or if an attempt had been made and he had resisted—" and I put that in hypothetically, the trying of the shoes, even though illegal would not have been accomplished without the use of force, and the defendant would have been the first to condemn.

And I said further that with regard to trying the
766 shoes on in the court room even if the defendant had put the shoes on the jury would be unable to tell whether they actually fit or not; whether they were too large or too small. And I said nothing further on the point. So, I see no possibility of error in that particular line of argument. And I don't think we can afford to assume that it would have been proper to try the shoes on because I don't think the Holt case is that clear.

If I remember that case, it is not precisely possible to tell whether the jacket or blouse, I think the court called

it, which was tried on the defendant was one that he testified concerning in his direct testimony or it had come out at a part of the case in chief, because the defendant here made no reference to the shoes in his testimony, and I am not sure that I could have properly made a reference to it or forced him to try them on.

I think with the exception of the argument concerning the shoes and the reference to them in the final argument,

nothing has been raised by this motion for a new
767 trial which has not already been argued before the

Court and ruled on during the court of the trial. For that reason I have not gone to the extent of citations of law but merely indicated the same general line of argument which the Government has previously adopted.

Thank you.

The Court: All right, Mr. Green.

Mr. Green: Just one brief word in reply, if the Court please, in regard to Mr. McGarr's recollection of the extent of the testimony of the Federal Bureau of Investigation Agent in rebuttal:

My recollection may be faulty on this, but I am virtually certain that the defendant when he was on the stand testified that initially he had not told the Federal Bureau of Investigation people the truth concerning his movements the night before, but did after he determined the nature of the investigation.

Now, what then was there to rebut? I don't think Mr. McGarr's statement which was in rebuttal that there was anything said by the defendant could be correct.

As far as Mr. McGarr's recollection of his argu-
768 ment to the jury is concerned, I agree that after the

colloquy which occurred twice during the course of the argument was had before the Court, Mr. McGarr then returned to his argument to the jury and said, although

he did not try the shoe on, possibly because it might require the use of violence, the defendant would be the first to condemn to.

However, Mr. McGarr's remarks prior to the time of that colloquy were certainly couched in such language so that it struck me, as it struck the Court, that he was raising the question of the illegality, because that it what your Honor passed upon, and that it what my objection was based upon.

Those are the two possible corrections of Mr. McGarr's recollection that I want to bring to your Honor's attention.

Thank you.

The Court: It seems rather strange that neither one of you gentlemen mentioned what to me is the most incriminating evidence in the case, and that was the possession of the $2.00 bills.

In the robbery of this bank there were two packets
769 of $2.00 bills. as I remember it, 25 $2.00 bills in each packet. Soon thereafter those bills were found in the possession of the defendant.

Now, I know you are going to say that was two or three weeks afterward. But they were found in his possession and he was making purchases with those $2.00 bills in the Sears Roebuck Store on the West Side.

The bills were unequivocally traced to the bank. The bank had a list of the numbers of those $2.00 bills, and the defendant admitted he had them in his possession and with them he made purchases.

I think that was the most condemning piece of evidence in the entire case.

Now, in so far as the shoe is concerned, it was obtained in his wife's house, and he was present when it was obtained, and whether the Government could have forced him to try the shoe on or not, I am not sure whether they

could or not. But whether they could or not, that does not detract from the other evidence in the case.

The most important piece of which is the part of
770 the evidence connected with the possession of and the use of these $2.00 bills. Of course, the defendant had a story that he came about them legally. That somebody who was a friend of his gave them to him, and he didn't know where that friend was, and he hadn't seen him lately, but that is the source from which he got the $2.00 bills.

Now, in so far as this search called a search of convenience is concerned, I think it was quite apparent that there is positive evidence that none of the FBI Agents had seen the man enter the house. They saw the car in which he had been riding in front of the house, and soon thereafter they demanded admission and they went into the house and found him. They immediately arrested him because they had a warrant for his arrest, and then they searched him and searched the premises, and they found the shoes that have been discussed here.

Of course, the reason that shoes were so important was due to the fact that the FBI Agents at the place where the robbery occurred sprinkled the top of the different
771 pieces of furniture or tables out there upon which the feet of one of the robbers had been placed, and from the powder thus spread around they got certain imprints, and those imprints tallied exactly with the heels of the shoes that were produced in court.

Those were the two most damaging pieces of evidence against the defendant, and the jury heard the case, and the jury found him guilty.

Now, it is true the evidence concerning the search of the safety deposit vault was permitted to go before the jury, but as soon as the point was reached whereby the Government could not satisfactory, in my opinion, make a con-

nection between the money there and the defendant, that evidence was withdrawn from the jury and immediately they were charged that they must not pay any heed to it at all, and they must disregard it entirely.

Then when we came to give the final instructions once more the jury was instructed along the same lines.

So, all in all, I think this man had a fair trial. He was most ably defended. I don't know of any two lawyers
772 who could have done a finer job in the defense of a person charged with crime than that done by Mr. Green and Mr. Gorman. But the jury heard this entire case and they didn't spend much time deliberating upon it. I understand they came back in about an hour, and they brought in a verdict of guilty. I don't think that verdict should be disturbed. Therefore, the motions presently made, you have one motion here for a new trial, that will be overruled.

What is the other motion?

The Clerk: Motion for judgment of acquittal.

The Court: That will be overruled.

The defendant will be remanded to the custody of the Attorney General for a period of five years.

Mr. Gorman: Will your Honor fix the bond pursuant to appeal? The rules provide that your Honor can so do.

The Court: Well, you have raised some very material points here. He is under a bond of $15,000 now?

Mr. Gorman: That is correct.

The Court: What do you say about that?

773 Mr. McGarr: I didn't hear it, your Honor.

Mr. Gorman: I asked the Court to fix the bond pursuant to appeal.

Mr. McGarr: I have to objection to that.

The Court: We will fix the bond at $15.000.

Mr. Gorman: Thank you, your Honor.

(Whereupon were all the proceedings had and taken in the above-entitled matter on the day heretofore described.)

774

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 56 CR 62) • •

CERTIFICATE

I hereby certify that the above and foregoing 774 consecutively numbered pages is a full, true and accurate transcript of the original shorthand notes taken at the hearing of the above-entitled case before the Hon. Michael L. Igoe, Judge of said court, on April 25, 26, 29, 30, and May 1, 2, & 13, 1957.

/s/ Everett H. Hughes
Official Court Reporter
U. S. District Court
Northern District of Illinois

May 31, 1957.

775 United States of America)
Northern District of Illinois) ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify certain original papers constituting Volume 2 of the record on appeal in the cause entitled: United States of America, Plaintiff vs. Nicholas Guido, Defendant, No. 56 CR 62, as follows:

The Clerk's File Copy of the Transcript of Proceedings of the hearing before the Honorable Michael L. Igoe, District Judge on April 25, 26, 29 and 30 and May 1, 2 and 13, 1957, and filed June 26, 1957 by the Official Court Reporter

Government's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 11, 12 and 12A, 16, 17, 17A, 18A, 19 and 20, and

Defendant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12,

All Exhibits, filed June 26, 1957

filed among the records of the said Court in my office, on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of July, 1957.

Roy H. Johnson
Clerk
By /s/ Gizella Butcher
Deputy Clerk

(Seal)

20

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

Thursday, May 2, 1957

Present: Honorable Michael L. Igoe, District Judge

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant in his own proper person and by his counsel and the Jury and Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause also come and the trial proceeds and the Jury now having heard all the evidence adduced, the arguments of counsel and instructions of the Court it is

Ordered that the Alternate Jurors Charles E. Kenney and Fannie G. Marcus be and they are hereby discharged from further service as Jurors in this cause and the Jury

retire to their rooms in charge of sworn Marshals to consider their verdict and afterwards return into open Court and render their verdict and upon their oath do say:

"We, the Jury, find the defendant Nicholas Guido, guilty as charged in the indictment."

and it is

21 Adjudged that that the defendant is guilty as charged and convicted and thereupon the defendant by his counsel moves for judgment of acquittal and for a new trial which motions are entered and set for hearing on May 13, 1957 and it is

Ordered that the defendant's bond in the sum of Fifteen Thousand Dollars shall remain in full force and effect.

22

UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

VERDICT

(Filed May 2 1957)

We, the Jury, find the defendant Nicholas Guido, guilty as charged in the indictment.

Edward C. Gustavson	Richard Bishop
Foreman	John Katakis
Michael L. Heiser	Edith F. Seidler
Mary E. Collins	Irma Paolini
Lorraine Lindquist	Gertrude Archie
Mabel C. Kirwan	Eileen Mintefering
Mattie Williams	

23

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

Monday, May 13, 1957

Present: Honorable Michael L. Igoe, District Judge
On the defendant's motion it is
Ordered that bond on appeal be and the same is hereby fixed in the sum of Fifteen Thousand Dollars.

24

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 56 CR 62) * *

MOTION FOR NEW TRIAL
(Filed May 13, 1957)

Comes now the defendant, Nicholas Guido, by his attorneys, Richard E. Gorman and Joseph E. Green, and moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's case.

2. The Court erred in denying defendant's motion for acquittal made at the conclusion of all of the evidence.

3. The verdict is contrary to the weight of the evidence.

4. The verdict is not supported by substantial evidence.

5. The Court erred in overruling the motion to suppress and permitting evidence to be admitted respecting the search, and the fruits thereof, which was allegedly
25 conducted at 1110 South Austin Avenue, Oak Park, Illinois, on or about January 17, 1956, and did particularly err in allowing Government's Exhibits 12 and 12A to be introduced in evidence, which said evidence consisted of a pair of shoes, for in that (a) the arrest of the defendant was an arrest of convenience made in the premises aforesaid for the purpose of accomplishing a search thereof; (b) the search made allegedly incident to such

arrest exceeded in extent the lawful and permissible limits for a search made incident to arrest; and (c) Government's Exhibits 12 and 12A constituted property not subject to search or seizure under the laws of the United States and particularly, under Rule 41 of the Federal Rules of Criminal Procedure.

6. The Court erred in denying the motion for a mistrial made by the defendant based upon press and radio publicity.

7. The Court erred in denying the defendant's motion for a mistrial based upon the great volume of incompetent, irrelevant and prejudicial evidence which the jury was permitted to hear, particularly that relating to the defendant's alleged renting of a safety deposit box at the Pioneer Trust & Savings Bank under a false or assumed name shortly after the commission of the offense charged in the indictment and depositing therein the amount of $3,150.00, which said money was in no wise identified or connected with the robbery charged in the indictment.

8. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstance: The attorney for the Government stated in his argument to the jury that Government's Exhibits 12 and 12A could not be and were not fitted upon the feet of the defendant by way of demonstrative proof for the reason that such action would have been illegal, which said statement of the attorney for the Government was, after objection of the defendant's attorneys, reinforced by remarks made by the Court in the hearing and presence of the jury, whereas under the law such demonstration would have been proper and legal.

9. The Court erred in admitting improper evidence upon rebuttal.

/s/ Richard E. Gorman
Richard E. Gorman
/s/ Joseph E. Green
Joseph E. Green
One N. LaSalle St.
Chicago 2, Illinois
CEntral 6-7722
Attorneys for Defendant,
Nicholas Guido

27

UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

JUDGMENT AND COMMITMENT

On this 13th day of May, 1957 came the attorney for the government and the defendant appeared in person and[1] by his counsel and the Court having heard the arguments of counsel and being fully advised in the premises it is

Ordered that the motions of the defendant for judgment of acquittal and for a new trial be and the same are hereby overruled.

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of Section 2113, Title 18, United States Code (Bank Robbery) as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Five (5) Years.

It Is Adjudged that[3]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Igoe

United States District Judge

The Court recommends commitment to:[6]

May 13, 1957

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

28

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

United States of America,
Plaintiff-Appellee,
vs.
Nicholas Guido,
Defendant-Appellant
} No. 56 CR 62

NOTICE OF APPEAL
(Filed May 21 1957)

Name and Address of Appellant: Nicholas Guido, Chicago, Illinois.

Name and Address of Appellant's Attorneys: Richard E. Gorman, One North LaSalle Street, Chicago 2, Illinois. Joseph E. Green, One North LaSalle Street, Chicago 2, Illinois.

Offense: Violation of Section 2113 of Title 18 of the United States Code, that is to say, the robbery of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, taking therefrom money belonging to and in the possession of such bank, and in the commission of such offense, putting in jeopardy the life of a person by the use of a firearm.

29 Concise Statement of Judgment or Order giving Date and any Sentence: Finding of guilty by a jury on May 2, 1957, with judgment on such verdict, and sentence of the defendant, Nicholas Guido, to the custody of the Attorney General for a period of 5 years on May 13th, 1957.

Name of Institution where Defendant now Confined, if not on Bail: Defendant, Nicholas Guido, Released on Bail.

I, the above named appellant, hereby appeal to the

United States Court of Appeals for the Seventh Circuit from the above stated judgment.

Dated: May 20, 1957.

/s/ Nicholas Guido
Nicholas Guido

/s/ Richard E. Gorman
Richard E. Gorman

/s/ Joseph E. Green
Joseph E. Green
One N. LaSalle St.
Chicago 2, Illinois
CEntral 6-7722

30 United States of America }
Northern District of Illinois } ss.

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on the 21st day of May, 1957, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, and Criminal procedure, a copy of the foregoing Notice of Appeal was mailed to:

Honorable R. Tieken, United States Attorney
450 United States Court House
Chicago 4, Illinois

Attention: Appeal Division
Honorable Kenneth J. Carrick, Clerk
United States Court of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 21st day of May, 1957.

Roy H. Johnson
Clerk
By /s/ Gizella Butcher
Deputy Clerk

(Seal)

31

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

STIPULATION RE RECORD ON APPEAL
(Filed Jun 17 1957)

To: Mr. Roy Johnson,
Clerk of the District Court

It Is Hereby Stipulated by and between the parties hereto through their respective attorneys that the Clerk of the District Court shall transmit to the Clerk of the Court of Appeals for the Seventh Circuit the following:

1. Indictment No. 56CR62 filed January 31, 1956.
2. Defendant filed appearance bond in the amount of $15,000 February 1, 1956.
3. Defendant's plea of not guilty March 20, 1956.
4. Defendant's motion to quash search warrant June 13, 1956.
5. Court's order denying motion to quash search warrant and suppress evidence seized thereunder July 20, 1956.
6. Transcript of proceedings of trial commencing April 25, 1957 to and including May 2, 1957.

7. Order denying defendant's motion for mistrial entered April 29, 1957.

32 8. Order denying defendant's motion for directed verdict of not guilty made at the close of the Government's case April 30, 1957.

9. Jury's verdict of guilty entered May 2, 1957.

10. Order denying defendant's motion for judgment of acquittal and motion for new trial May 13, 1957.

11. Order committing defendant to custody of Attorney General for a period of five (5) years entered May 13, 1957.

12. Order fixing defendant's bond on appeal in the amount of $15,000.

13. All original exhibits introduced in evidence by the Government.

14. All original exhibits introduced in evidence by the defendant.

15. Defendant's notice of appeal entered May 21, 1957.

/s/ R. Tieken
R. Tieken,
U. S. Attorney

/s/ Joseph E. Green
Joseph E. Green

/s/ Richard E. Gorman
Richard E. Gorman
Attorneys for Defendant,
Nicholas Guido

33

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

STATEMENT REQUIRED BY RULE 12(d) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Filed June 27, 1957)

The name of the appellee is:

United States of America.

The names and address of counsel for the appellee are:

R. Tieken, United States Attorney
John Peter Lulinski, Assistant United States Attorney
Frank J. McGarr, Assistant United States Attorney
450 United States Court House
Chicago 4, Illinois.

/s/ R. Tieken
R. Tieken,
United States Attorney.

FJMcG:hma

34

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 62) • •

Friday, June 28, 1957

Present: Honorable Michael L. Igoe, District Judge

On motion of defendant by his counsel it is

Ordered that the time within which to file and docket record on appeal in the United States Court of Appeals for the Seventh Circuit, be and the same hereby is extended to and including July 30, 1957.

United States of America }
Northern District of Illinois } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: The United States of America, Plaintiff vs. Nicholas Guido, Defendant, No. 56 CR 62, as follows:

Indictment filed January 31, 1956

Plea and arraignment entered March 20, 1956

Motion to Quash Search Warrant and to Suppress evidence and for the Return of Property filed June 13, 1956

Answer to Motion to Quash Search Warrant and to Suppress Evidence filed July 12, 1956

Order entered July 20, 1956 denying defendant's motion to quash the search warrant

Order entered April 29, 1957 overruling defendant's motion for a mis-trial

Order entered April 30, 1957 denying defendant's motion for directed verdict of not guilty at the close of the Government's case

Order entered May 2, 1957 rendering of the Jury's verdict of guilty

Verdict filed May 2, 1957

Order entered May 13, 1957 fixing appeal bond in the sum of Fifteen Thousand Dollars

Defendant's Motion for new trial filed May 13, 1957

Order entered May 13, 1957 overruling defendant's motions for judgment of acquittal and for a new trial; judgment of guilty entered and defendant committed for five (5) years

36 Defendant's Notice of Appeal filed May 21, 1957
Clerk's certificate of mailing attached thereto
Stipulation re record on appeal filed June 17, 1957
Statement required by Rule 12(d) of the Rules of the United States Court of Appeals, for the Seventh Circuit filed June 27, 1957
Order entered June 28, 1957 extending the time in which to file and docket record on appeal to and including July 30, 1957

filed and entered among the records of the said Court in my office, on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of July, 1957.

Roy H. Johnson
Clerk

By /s/ Gizella Butcher
Deputy Clerk

(Seal)

LIBRARY
SUPREME COURT. U. S.

Supreme Court, U.S.
FILED
MAR 28 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 869

NICHOLAS GUIDO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RICHARD E. GORMAN,
JOSEPH E. GREEN,
One North LaSalle Street,
Chicago 2, Illinois,
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No.

NICHOLAS GUIDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Nicholas Guido, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on May 2, 1957 and is not reported.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed January 3, 1958 and is included in the Appendix hereto and in the certified copy of the record.

JURISDICTION.

On February 20, 1958 it was ordered that the petition for rehearing be denied. This petition is filed within 30 days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Was it not reversible error for the Trial Court to refuse to sustain a pretrial motion, renewed during the course of the trial, to suppress evidence obtained as a result of a search of a safety deposit box rented by the petitioner under an assumed name shortly after the commission of the offense and his deposit therein of $3,150.00?

2. Was it not reversible error for the Court of Appeals to hold, as did the Trial Court, that shoes seized in an apartment at the time of the petitioner's arrest came within the scope of Rule 41(b) of the Federal Rules of Criminal Procedure and were the means of commission of an offense?

3. Was it not reversible error for the Court of Appeals to hold, as did the Trial Court, that considering the Government's burden of proving your petitioner guilty beyond a reasonable doubt, the evidence was sufficient to sustain a verdict of guilty?

STATEMENT OF THE CASE.

Your petitioner was charged in a single count indictment with a violation of Section 2113 of Title 18 of the United States Code, that is to say, of the crime of bank robbery. The indictment charged that Guido, with unknown persons, on November 4, 1955 at Maywood, Illinois,

by force, violence and intimidation, feloniously took approximately $21,906.82 from the Maywood-Proviso State Bank, the deposits of which bank were insured by the Federal Deposit Insurance Corporation. The petitioner was found guilty by a verdict of a jury and from a judgment entered thereon, appealed to the Court of Appeals for the Seventh Circuit, wherein the judgment was affirmed with one judge dissenting.

The Government to sustain its burden of proof in the Trial Court introduced testimony by employees of the bank that on the date in question three masked robbers entered the bank with machine guns and took the sum of money set out in the indictment. One of the robbers climbed up on a marble counter in the bank. Seventy-one days later your petitioner was identified as having passed five $2.00 bills which were identified as being part of the proceeds of the robbery. There was testimony that a heel print of a shoe seized in the apartment where the petitioner was arrested was similar to a heel print found on the marble counter in the bank. The petitioner, testifying in his own behalf, denied participation in the robbery and stated that he was elsewhere at the time of the commission of the offense and was supported in this alibi by the testimony of two other witnesses. In rebuttal, the Government produced a witness whose testimony was in conflict with that of the petitioner and his alibi witnesses as to his whereabouts at the time of the commission of the offense.

STATUTE CONCERNED.

Section 2113, Title 18, United States Code.

REASONS FOR GRANTING WRIT.

1. The Court of Appeals has decided an important federal question in a way in conflict with applicable decisions of this Court.

2. The Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeal.

3. The Court of Appeals has departed far from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court so as to call for an exercise of this Court's power of supervision.

We shall address ourselves *seriatim* to the above numbered reasons. We shall make our presentation as succinctly as possible.

---

1. On January 19, 1956, two days after the arrest of the petitioner, Special Agents of the Federal Bureau of Investigation, acting under the authority of a search warrant issued by the Trial Judge, searched a Safety Deposit Box No. 6728 in the Pioneer Trust and Savings Bank in Chicago, which box had been rented by the petitioner under the name of Don Schiavone. They then took from this box $3,150.00 in United States currency. The search warrant was obtained upon the affidavit of Ross T. Spencer, assigning as grounds for the warrant's issuance the following:

> "That Don Schiavone (also known as Nicholas Guido, has been identified as possessing and passing currency stolen from said bank and that *information derived from an informer* (emphasis supplied) is that the proceeds of above bank robbery are in the said Safety Deposit Box; further, the box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido."

Amendment IV to the United States Constitution is definite in its statement that no search warrant shall issue "but upon probable cause supported by oath or affirmation * * *", and Rule 41(c) of the Federal Rules of Criminal Procedure provides that:

> "A warrant shall issue only on affidavit sworn to before the Judge or Commissioner and establishing the grounds for issuing the warrant * * *".

Thus, in order to have a valid warrant, it must be made to appear by affidavit in this case that the box contained property stolen in violation of the laws of the United States (Rule 41, Federal Rules of Criminal Procedure, section (b) (1)). It is patent that the affidavit on which the instant warrant was issued, sets forth the only facts which would give rise to a belief that the box contained stolen property were facts which affirmatively appear from the face of the affidavit to be hearsay to the affiant.

Three alleged facts are set up by the affidavit. The first of these is that Schiavone, alias Guido, had been identified as possessing and passing currency stolen from the Maywood-Proviso State Bank. It requires no argument that such an allegation would not support the issuance of a search warrant directed against his effects and property. Another fact stated by the affidavit is that the box in the name of Schiavone had been recently rented in the Pioneer Trust and Savings Bank by a man answering the description of the petitioner. This fact also would not give rise to probable cause to believe that such box contained property stolen in violation of the laws of the United States. Beyond these two facts, nothing in the affidavit appears to be stated upon the knowledge of the affiant, Special Agent Spencer. The only allegation in the affidavit which, if true, would give rise to grounds

for issuance of the warrant is "that the proceeds of above bank robbery are in said safety deposit box", but such allegation affirmatively and definitely appears to be based on information which has been derived from an informer. The affidavit for that matter fails to as much as furnish the name of the informer, who supplied the only basis upon which a search warrant might validly issue.

It has been repeatedly held that the evidence which must be presented by the affidavit, must be competent evidence within the knowledge of the affiant and cannot be hearsay or rumor. It is readily conceded that the showing made upon the affidavit need not be such as would sustain a conviction, nor for that matter even amount to creation of probable cause of guilt, but such permissible relaxation in the quantum of proof required does not change the strict and inflexible rule that the evidence presented by affidavit be competent evidence falling within the personal knowledge of the affiant. To hold otherwise would render the requirement of an affidavit a nullity, since an affiant might always defend against a charge of making a false oath by showing the receipt of hearsay evidence he had received from parties who had not made affidavits in support of the application for the search warrant.

The question thus is not one as to the quantity of evidence that need be submitted to the issuing authority, but is one of the character or quality of such evidence. It is true that the evidence need not be such as to convince the Court of the existence of probable cause, but nevertheless it must be such evidence as would be competent and admissible before the jury, and upon which perjury for untruth, may be predicated.

In *Grau* v. *U. S.*, 287 U.S. 124, at 128 (77 L. Ed. 212, at p. 215) the Supreme Court of the United States laid down the rule that

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury *(Giles* v. *U. S.*, (CCA, 1st), 284 Fed. 208; *Wagner* v. *U. S.* (CCA 8th) 8 Fed. (2d) 581); and would lead a man of prudence and caution to believe that the offense had been committed. *Steele* v. *U. S.*, 267 U.S. 498, 504, 69 L. Ed. 757, 760."

It is submitted respectfully that the foregoing illustrates that the opinion of the Court of Appeals is in direct conflict with applicable decisions of this Court.

2. A Motion to Suppress as evidence certain articles, seized at the time of the petitioner's arrest at 1110 South Austin Boulevard, Oak Park, Illinois, was overruled by the Trial Court (App. 218). This motion was made by the defense after Agents of the Federal Bureau of Investigation had testified concerning the circumstances leading up to the arrest of the petitioner and was particularly directed against the introduction into evidence of Government's Exhibits 12 and 12A, which consisted of a pair of shoes, without which evidence the case of the Government would have utterly failed.

It is axiomatic that arresting officers are without authority to seize articles and property when making a search without a search warrant, which articles or property could not have been lawfully taken had the search been made under a validly issued warrant.

Rule 41(b) of the Federal Rules of Criminal Procedure states:

> "(b) Grounds For Issuance. 'A warrant may be issued under this rule to search for and seize any property (1) stolen or embezzled in violation of the

laws of the United States, (2) *designed or intended for use or which has been used as the means for committing a criminal offense;* (3) possessed, controled, or designed or intended for use of which is or has been used in violation of Title 18, U.S.C., 957.'" (Emphasis supplied).

Clearly, Government's Exhibits 12 and 12A (the shoes) cannot be contended to be property "stolen or embezzled in violation of the laws of the United States", nor "possessed, controled, or designed for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or law of nations". Therefore, if the same are lawfully admissible, it must be on the basis that the shoes were "designed or intended for use or had been used *as the means* of committing a criminal offense". (Emphasis supplied).

Obviously, the shoes were of great and, for that matter, controlling value in the Government's case. Also, that they were worn by the petitioner in his alleged robbery of the Maywood-Proviso Bank is the precise point which the Government seeks to make by their use. Their evidentiary value was thus great. This fact, however, does not transmute them into belonging to a class of property into which they simply do not fall. It must be noted that the rule does not permit the seizure of articles merely because they have *been used* in the commission of a criminal offense. It requires that the articles be used as *the means* thereof.

In support of this argument, the Court's attention is respectfully directed to *Gouled* v. *United States,* 255 U.S. 298, at p. 308: (65 L. Ed. 647, at p. 652)

> "The wording of the 4th Amendment implies that search warrants were in familiar use when the Constitution was adopted, and, plainly, that when issued 'upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched and the persons or things to be seized,' and seizures made under them are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the *Boyd* Case, 116 U.S. 616, 29 L. Ed. 746, 6 Sup. St. Rep. 523, and the *Weeks* case 232 U.S. 383, 58 L. Ed. 652, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177, in which it is pointed out that, at the time the Constitution was adopted, stolen or forfeited property, or property liable to duties, and concealed to avoid payment of them, excisable articles, and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling, 'and many other things of like character,' might be searched for in home or office, and, if found, might be seized, under search warrants lawfully applied for, issued, and executed.

"Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks* Cases, *supra*, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession

of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken. *Boyd* Case, 116 U.S. 623, 624, 29 L. Ed. 748, 6 Sup. Ct. Rep. 524."

In the same connection, the Supreme Court in *Lefkowitz* v. *United States,* 285 U.S. 452, at p. 461 (76 L. Ed. 877 at p. 882) stated as follows:

"The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrests. And that must be decided on the basis of valid arrests under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

"The 4th Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. *Byars* v. *United States,* 273 U.S. 28, 32, 71 L. Ed. 520, 523, 47 S. Ct. 248. Its protection extends to offenders as well as to the law abiding. *Weeks* v. *United States,* 232 U.S. 383, 58 L. Ed. 652, L.R.A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177; *Agnello* v. *United States,* 269 U.S. 20, 32, 70 L. Ed. 145, 148, 51 A.L.R. 409, 46 S. Ct. 4. The authority of officers to search one's house or

place of business contemporaneously with his lawful *arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained.* Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States* v. *Kirschenblatt* (C.C.A. 2d) 51 A.L.R. 416, 16 F. (2d) 202, 203; *Go-Bart Importing Co.* v. *United States, supra.*

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States,* 255 U.S. 298, 310, 65 L. Ed. 647, 653, 41 S. Ct. 261.

". . . Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is

liable, and from searches such as those made for the seizure of counterfeit coins, burglar's tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Boyd* v. *United States*, 116 U.S. 616, *et seq.*, 79 L. Ed. 746, 6 S. Ct. 524; *Weeks* v. *United States*, 232 U.S. 383, 395, 58 L. Ed. 652, 656, L.R.A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177; *Gouled* v. *United States, supra*, *Carroll* v. *United States, supra.*"

3. Despite the length of the record in the case at bar, and the substantial number of witnesses who testified, it can be categorically stated that no evidence whatsoever was received which in any wise tended to connect the petitioner with the robbery of the Maywood-Proviso State Bank charged in the indictment, save and except the following items of circumstantial evidence:

1. Seventy-one days after the robbery the petitioner had in his possession and used in the purchase of goods and services at Sears, Roebuck Department store in Chicago five $2.00 bills which were taken from the robbed bank;

2. In the apartment in which he was placed under arrest were found a pair of shoes, the left heel of which made an imprint similar to that found on the counter of the robbed bank.

Viewing this evidence, as we must, in a light most favorable to the prosecution, and totally disregarding the evidence adduced by the defense, in a case as close as this where a great mass of incompetent evidence was heard by the jury, it is respectfully submitted that the Court erred in permitting the matter to be decided by a jury, and it is respectfully submitted that the Court of Appeals should have adopted the dissent as the decision of the Court for the reasons stated therein.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD E. GORMAN,
JOSEPH E. GREEN,
Attorneys for Petitioner.

APPENDIX.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 12090 SEPTEMBER TERM AND SESSION, 1957

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NICHOLAS GUIDO,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

January 3, 1958

Before DUFFY, *Chief Judge*, and MAJOR and PARKINSON, *Circuit Judges.*

DUFFY, *Chief Judge.* By the verdict of a jury, defendant was convicted under a single count indictment of the crime of bank robbery. He was sentenced to imprisonment for a term of five years.

On November 4, 1955, the Maywood-Proviso State Bank, Maywood, Illinois, was robbed of approximately $22,000.00 by three robbers. The deposits were insured by the Federal Deposit Insurance Corporation. The robbers were masked and brandished machine guns during the course of the robbery. One of the robbers climbed up on a marble counter in the bank. The rubber heel which was a part of one of the shoes which he wore made a distinct and plainly visible print on the counter. F.B.I. agents made a number of pictures of the heel print, some of which were received in evidence.

Errors relied on consist of the trial judge's refusal to suppress evidence obtained as a result of a search of defendant's safety deposit box; refusal of the trial judge to suppress evidence obtained in the search of an apartment which was made at the time of the defendant's arrest; that much incompetent and irrelevant evidence was received which was prejudicial to the defendant although such evidence was later stricken; alleged improper evidence received on rebuttal and denial by the trial court of defendant's motion for acquittal.

Two days after the arrest of defendant, special agents of the F.B.I. obtained a search warrant from the trial judge and searched a safety deposit box in the Pioneer Trust and Savings Bank in Chicago, which box had been rented by defendant under the name of Don Schiavone. Currency in the amount of $3,150.00 was taken from the box. Relying upon *Grau* v. *United States,* 287 U.S. 124, defendant insists that the affidavit upon which the search warrant was obtained, was insufficient because it was, in part, based upon evidence that would be hearsay if offered at the trial.

The only hearsay evidence referred to in the affidavit was that an informer had supplied the information that some of the currency stolen from the Maywood-Proviso Bank was in Safety Deposit Box no. 6728. However, the affidavit stated from personal knowledge that defendant had been identified as possessing and passing currency stolen from the Maywood-Proviso State Bank; that defendant Guido was also known as Don Schiavone, and that a man named Don Schiavone answering the description of defendant Guido had recently rented Safety Deposit Box No. 6728.

Under Rule 41, Federal Rules of Criminal Procedure, the judge issuing the search warrant must be "* * * satisfied that grounds for the application exist or that there is probable cause to believe that they exist * * *." If so satisfied, he is empowered to issue the warrant.

Insofar as the *dictum* in *Grau* v. *United States,* 287 U.S. 124, 128, may be said to uphold the view here es-

poused by the defendant, we think it has been repudiated by the later case of *Brinegar* v. *United States*, 338 U.S. 160, 174.[1] We hold the affidavit was a sufficient basis for the issuance of the warrant authorizing the search of the safety deposit box, and that the judge did not abuse his discretion in issuing the search warrant.

The bases for the motion to suppress as evidence certain articles seized at 1110 South Austin Blvd., Oak Park, Illinois, upon the occasion of defendant's arrest were a) that defendant's arrest was one of convenience, and b) that Government Exhibits 12 and 12-A (a pair of defendant's shoes) cannot be considered "means of committing a criminal offense."

It is true that there were a number of F.B.I. agents who had the apartment at 1110 South Austin Blvd. under surveillance on the day of defendant's arrest. Yet, only two agents saw defendant just before he entered the apartment. They saw him in traffic only momentarily, and then lost sight of him. When they again located defendant's Cadillac, it was parked in front of 1110 South Austin Blvd., and the driver was no longer in the car. There is no evidence in the record to substantiate defendant's claim that his arrest was one of convenience.

Rule 41(b), Federal Rules of Criminal Procedure, states in part: "(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property 1) Stolen or embezzled in violation of the laws of the United States; or 2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; * * *" The rule further states: (g) The term 'property' is used in this rule to include documents, books, papers and any other tangible objects."

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[1] In *Brinegar*, footnote 13 of the opinion stated: "But see, *e.g. Grau* v. *United States*, 287 U.S. 124, 128, in which it was said by way of *dictum* that 'A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury. * * *' For this proposition there was no authority in the decisions of this Court. * * * The statement has not been repeated by this Court."

Defendant argues that articles are not "the means" of committing an offense merely because they have been used in the commission of an offense. If, during a robbery, a robber had a gun in his hand, and wore a mask and gloves, the latter to prevent finger prints, defendant, apparently, would concede that such articles could be seized in a search incidental to a lawful arrest. However, defendant insists that shoes worn during a robbery do not come within that category.

It is not logical to place in different categories a mask and a hat which might have been worn and pulled down upon the face of the robber to make identification more difficult. It is likewise difficult to place in different categories a pair of gloves worn on the hands and a pair of shoes worn on the feet. Surely, the latter would facilitate a robber's get-away and would not attract as much public attention as a robber fleeing barefooted from the scene of the hold-up.

In *Harris* v. *United States*, 9 Cir., 151 F. 2d 837 the Court commented, page 840: "'The line between fruit of the crime itself and mere evidence thereof may be narrow' and perhaps turn more on the good faith of the search than the actual distinction between 'fruits' and 'evidence.'" We think this is a sound observation.

It is well established that a search cannot be upheld which is merely exploratory and made solely to find evidence of guilt. *United States* v. *Lefkowitz, et al.*, 285 U.S. 452, 465, and *Go-Bart Importing Company, et al.*, v. *United States*, 282 U.S. 344. Where a search warrant was obtained for specifically described papers which admittedly had evidentual value only, the search was held to be invalid. *Gouled* v. *United States*, 255 U.S. 298. However, in *Marron* v. *United States*, 275 U.S. 192, where a ledger and utility bills were seized, it was held that they were means of committing a crime, namely, the operation of a saloon. In *Morton* v. *United States*, DC Cir., 147 F. 2d 28, cert. den. 324 U.S. 857, the court approved admitting into evidence a blood-stained shirt and trousers found in defendant's closet in a case where murder was the charge.

Admittedly, there has been some confusion in the language used by different courts as to what kind of articles may be seized incidental to an arrest of a defendant. However, in the case at bar, we hold the arresting officers were entitled to seize the pair of defendant's shoes and that same were properly received into evidence at the trial. We hold the arrest was not made as an excuse for a general exploratory search.

As a basis for our holding, we think well worth repeating the statement made by this Court in *United States v. Pisano, et al.* 7 Cir., 193 F. 2d 361, 363: "Under the Fourth Amendment of the Constitution the people are protected from unreasonable searches * * * Searches and seizures incidental to an arrest but without search warrants are not necessarily unreasonable but are, in the absence of unusual circumstances, entirely reasonable. The right to search the place where the arrest is made and to find and seize things connected with the crime as its fruits or as the means by which it is committed stems not only from the authority to search the person but also from the long standing practice of searching for other proofs of guilt within the control of the accused upon arrest. *Weeks* v. *United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652. Consequently the premises where a valid arrest is made, under the control of the person arrested, are subject to search without a search warrant. Such a search is not unreasonable. * * * The only essential of validity of a search incidental to an arrest is that it be made in connection with a valid arrest. * * *"

Defendant insists that much incompetent and irrelevant evidence was received with reference to the contents of his lock box and although the Court later struck same from the record, that it was, nevertheless, prejudicial. The Government undoubtedly was disappointed in the testimony of a woman bank teller who identified pencilled notations she had made on four $50.00 bills, and which bills were found in defendant's lock box. She first said she made the notations upon the day of the robbery, but upon cross examination, she was not certain of the date.

The trial court then denied defendant's offer of the bills into evidence. However, much of her testimony remained, such as that a packet of twenty-five $2.00 bills was taken from her cage by one of the robbers.

Some of the testimony which defendant says was prejudicial although later stricken, was testimony to which he stipulated. However, the Court promptly admonished the jury to disregard the testimony which was stricken and also gave adequate instructions with reference thereto. No request by defendant to admonish the jury was denied during the trial. No requested instruction to disregard portions of the testimony was denied. We hold there was no error in this respect.

Defendant argues that evidence received in rebuttal was improper and prejudicial. Defendant had attempted to establish an alibi by testifying on the trial that he was in the Roxy Movie Theatre across the street from his apartment on the evening of the robbery. He specified that he was in the theatre watching a movie entitled "To Catch a Thief" from about 6:00 P.M. to 8:30 or 9:30 P.M. Other testimony established that the robbery occurred about 6:22 P.M. Defendant also denied on the trial that he had made certain statements to F.B.I. agents such as that he had spent the night in question in another location.

On rebuttal, the Government offered evidence of F.B.I. agents as to statements which the defendant had made to them and which he had denied upon the trial. Testimony was also introduced which, if believed by the jury, completely demolished the alibi which the defendant had so carefully built up. We think all of such evidence was proper and no error was committed by receiving same.

The last and probably the most important point argued by defendant is that the evidence adduced by the Government was insufficient to sustain a judgment of conviction. We have read the long record containing the testimony in this case. Having in mind that the jury was the sole judge of the credibility of the witnesses, and that the

experienced trial judge had observed these witnesses, we think the Court properly denied defendant's motion for acquittal, and that the jury's verdict of guilty, and the judgment of conviction thereon, must be upheld.

The evidence must, of course, be viewed in the light most favorable to the Government. *United States* v. *Detente*, 7 Cir., 199 F. 2d 286. When so viewed, we hold there is substantial evidence to support the judgment of conviction.

It was clearly established that the rubber heel of one of the shoes found in defendant's closet upon the occasion of his arrest was the heel which left a clear imprint on a marble counter in the bank. It was also established that one of the robbers in going from one cage in the bank to another, stepped upon the counter in question. Although the defendant did not specifically admit that the shoes were his, he did say "Well, they might be mine," and under the circumstances of their location, it was a permissible inference for the jury to make that the shoes belonged to the defendant and were worn by him on the day of the robbery.

Two packets of twenty-five $2.00 bills were taken from the Bank during the robbery. The Bank had a record of the serial number of each of said bills, and this record was introduced into evidence. It was proved that defendant used five of the bills stolen from the Bank in making purchases from a Sears Roebuck & Co. store. The purchases were in five separate departments of the store, and defendant used only one bill in making each of said purchases. True, defendant told a story of winning these bills by gambling. However, the jury who knew that defendant had twice previously served prison terms for larceny, and who were the sole judges of his credibility, just didn't believe his story.

The jury also was entitled to consider the elaborate alibi which defendant attempted to build only to have it demolished by rebuttal witnesses. Undoubtedly, in the eyes of the jury, the defendant was entirely discredited.

It must be granted that the quantity of proof showing defendant's built is not great. But it is typical of the evidence that would be available in any robbery where the perpetrators were hooded or otherwise masked, and who made a get-away without trace. The volume of evidence in this case may not be great, but its quality is high. We hold the Government sustained the burden of proof which was upon it, and that the judgment of conviction must be and is

AFFIRMED.

MAJOR, *C. J., dissenting.* I feel obliged to dissent and shall briefly state my reasons therefor. I agree that a search warrant was properly issued for the search of defendant's safety deposit box in the Maywood-Proviso Bank. I also agree that the search of defendant's apartment incidental to his arrest was proper. I part company, however, with the statement, "The volume of evidence in this case may not be great, but its quality is high." In my view, the volume of evidence is meager and its quality inferior. The weakness of the government's case is at once apparent from the fact that it dwells upon how it demolished defendant's alibi. Of course, the validity of that defense was for the jury, but whether true or false it was without probative value in support of the bank robbery charge.

The sole affirmative proof relied upon by the government consists of two circumstances. The first is that defendant passed five $2 bills in a Sears, Roebuck & Company store, which were identified as having been stolen from the bank in the robbery. Thus, of fifty $2 bills stolen, five were found in possession of defendant. The significant fact regarding this possession, however, which renders it of little or no value, is that the bank was robbed November 4, 1955, and the five $2 bills were found in possession of defendant on January 14, 1956, seventy-one days after the robbery.

The second circumstance relates to the so-called rubber heel imprint testimony. An F.B.I. agent assigned to the

F.B.I. laboratory in Washington concluded that the imprint on the counter in the robbed bank was made by the heel of the shoe found in defendant's apartment. The testimony of this witness is, in my view, far from conclusive, particularly in view of the fact that the government had no direct proof that the shoe belonged to defendant. This essential link had to be inferred from the fact that the shoe was found in defendant's apartment seventy days after the robbery.

Weak as the government's proof was, however, I agree, with some hesitation, that it was sufficient to take the case to the jury and that its verdict should be respected, providing the trial was free from prejudicial error. This, in my view, was not the case. The record reeks with testimony heard by the jury which cannot be characterized as other than prejudicial, even though it was subsequently stricken. For my purpose it is sufficient to refer only to that which had its genesis in the search made of defendant's bank box which admittedly was rented by defendant under an assumed name on January 14, 1956, seventy-one days after the robbery. As a result of the search of this bank box, $3,150 was seized. This money was produced in court by the government, displayed before the jury and a mass of testimony heard relative thereto. This testimony was offered evidently with the intention of identifying it or some of it with the money seized in the robbery. However, after the jury had witnessed the display and listened to this testimony, it developed that the government was unable to make identification. In fact, the testimony of the witness relied upon for this purpose was characterized by the court as "incredible." Thereupon, the testimony of this witness, as well as that of all other witnesses, concerning the money found in defendant's bank box, was stricken and the jury was specifically instructed by the court both at that time and subsequently to disregard it.

The trial judge did all that was possible to ameliorate the damaging effect of this testimony by admonishing the

jury to disregard it. That the court succeeded is, in my judgment, highly improbable, particularly in view of the meager proof relied upon by the government. The situation calls for a reversal "unless it *affirmatively* appears from the whole record that it was not prejudicial." *McCandless et al.* v. *United States*, 298 U.S. 342, 347. The record furnishes no basis for such a belief.

We are told that the government was disappointed in the testimony of its witness by whom it attempted, but failed, to made identification. I do not doubt that such was the case but this disappointment cannot be utilized to impair defendant's right to a trial free from prejudicial error. In cases where proof of guilt is strong and convincing, it may be that a reviewing court can say, as often has been done, that an error made during the course of the trial could not have affected the result and is, therefore, not prejudicial. There is no justification, however, in my opinion, for the application of such a theory in the instant case.

I would reverse and remand for a new trial.

BRIEF FOR THE U.S. IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 869

NICHOLAS GUIDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a–8a) is reported at 251 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1958 (Pet. App. 8a). A petition for rehearing was denied on February 20, 1958. The petition for a writ of certiorari was filed on March 22, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by stricken testimony which the court instructed the jury to disregard.

2. Whether shoes suspected of having been worn by a robber could properly be seized incidental to a valid arrest.

STATEMENT

On May 2, 1957, in the United States District Court for the Northern District of Illinois, petitioner was convicted under a single-count indictment (R. 3) charging armed bank robbery in violation of 18 U. S. C. 2113 (R. 479–480). He was sentenced to imprisonment for 5 years (R. 483–484).

The bank in question was robbed of approximately $22,000 on November 4, 1955, by three masked men armed with a machine gun (R. 21–34).

Petitioner was arrested at his home under a warrant by agents of the Federal Bureau of Investigation (R. 78–85, 86–91, 129–138, 141–147, 152–166, 178–194). Among the articles seized in a search incidental to the arrest was a pair of shoes which petitioner, at the time, admitted might be his (R. 88–89). When asked if he had any objection to the seizure of the shoes, petitioner told the arresting officers, "You can take anything you want" (R. 88–89, 154).

Two days after the arrest, government agents obtained from the trial judge a warrant to search a safety deposit box (R. 11–12) rented by petitioner approximately two and a half months after the robbery (R. 3, 12, 276). The warrant was based upon an affidavit made by one of the agents which stated in pertinent part (R. 9–10):

> * * * That Don Schiavone (also known as Nicholas Guido), has been identified as possessing and passing currency stolen from said

bank and that information derived from an informer is that the proceeds of above bank robbery are in said Safety Deposit Box; further, a box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido.[1]

Prior to trial, petitioner moved to quash the search warrant and suppress the contents of the safety deposit box on the ground that the facts alleged in the affidavit were hearsay (R. 5–8). The court found the facts and circumstances set forth in the affidavit legally sufficient to support the issuance of the warrant and denied the motion (R. 15).

At the trial, evidence was introduced that 71 days after the robbery petitioner made purchases with five $2.00 bills taken from the bank at the time of the robbery (R. 46–53, 150, 241–242). The bank had a record of the serial numbers on the $2.00 bills which were stolen and the bills in petitioner's possession were identified by those numbers (R. 21–34, 148, 168–171). Petitioner admitted the purchases and possession of some $2.00 bills but claimed he had won the money gambling (R. 321–322).

Evidence was also introduced that at the time of the robbery one of the robbers stepped on a marble counter in the bank leaving an imprint of the heel of his shoe (R. 36, 42, 239–240, 250, 253). There was evidence that the rubber heel of one of the shoes found in petitioner's home at the time of his arrest

[1] The informer was unknown to the government (R. 103).

was the same heel that left the imprint on the counter (R. 42–43, 219–237).[3]

When it appeared that the government was about to introduce evidence concerning the safety deposit box, the motion to suppress this evidence was renewed and argument was had thereon outside the presence of the jury (R. 92–109). The trial court again upheld the government (R. 108–109). One of the F. B. I. agents who participated in the search then testified that he and some other agents opened the box pursuant to the search warrant and took $3,150.00 from it (R. 110). He found five $10 bills with serial numbers in sequence except for one missing bill and four $50 bills with numbers penciled in the margins (R. 111–113). It was stipulated that petitioner was the man who rented the box (R. 175, 177).[4]

A teller in the robbed bank testified that she had marked the numbers on the four $50 bills and had seen them on the day of the robbery (R. 242–243). She did not testify as to when she had marked them. On cross-examination she admitted that she was not sure she had seen the bills on the date of the robbery, but she persisted in her testimony that she had marked the bills (R. 245–248).[5] The government

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[3] Petitioner moved to suppress the evidence relating to the pair of shoes in question. He recognized that fruits or results of a crime may be seized incidental to a lawful arrest, but contended, *inter alia*, that the shoes could not have been used as a means of robbing the bank (R. 201, 208). The court denied the motion to suppress (R. 218).

[4] All the money was thereupon returned to petitioner except for the four $50 bills and the five $10 bills (R. 176).

[5] Apparently the bank did not have a record of the serial numbers of the stolen bills, other than the $2 bills.

moved the admission of the bills (R. 255) and the question was argued out of the hearing of the jury. The judge said "her testimony was so unsatisfactory that I don't think I would be justified in letting the jury say whether or not they believe it" (R. 259). The court was concerned with the amount of money the numbers on the bills represented (R. 258, 260). Defense counsel argued that the numbers represented a total of approximately $40,000 whereas only about $22,000 was stolen from the bank. Government counsel maintained that there was no testimony that the numbers represented certain totals of cash on hand (R. 263) and argued that it was relevant that the bills were in the bank at any time and later found in petitioner's possession, particularly since he had four and not just one of the bills and was not known to be a customer of the bank (R. 259). The government further argued that the credibility of the witness was a question for the jury. The court nevertheless sustained the objection to the admission of the bills on the basis that the testimony of the teller was "incredible" (R. 265). The five $10 bills were likewise excluded (R. 149–150). Thereafter, the court denied a motion for a mistrial but admonished the jury in his own words, and additionally in words supplied by petitioner, to disregard all the testimony concerning the safety deposit box and the contents thereof (R. 280). In addition, the general charge to the jury included an instruction to the same effect (R. 456).

Petitioner's defense was that he was at a movie at the time of the crime (R. 292–297, 298–301).[1] The government's evidence in rebuttal contradicted this (R. 370–391).

The Court of Appeals unanimously upheld the propriety of the warrant to search petitioner's safety deposit box and the search of petitioner's apartment incidental to his arrest (Pet. App. 1a–8a). One judge dissented from the affirmance of the conviction on the ground that, although the government's proof was sufficient to take the case to the jury, it was too weak to prevent the evidence concerning the safety deposit box from prejudicially affecting the result.

ARGUMENT

1. Petitioner contends that the trial court erroneously denied his motions to suppress the evidence relating to the safety deposit box. He maintains that the search and seizure were unlawful because the warrant was not issued on probable cause. He asserts, as he unsuccessfully asserted in the courts below, that the only fact set out in the "affidavit for search warrant" which would justify its issuance was the statement "that information derived from an informer is that the proceeds of above bank robbery are in the said Safety Deposit Box," and that that statement was hearsay and thus could not serve as a basis for a warrant (Pet. 4–7).

When the trial court struck all evidence and testimony relating to the box and its contents and emphatically instructed the jury to disregard it on several

[1] He also testified on direct examination that he had twice previously been convicted of larceny (R. 310–311).

occasions, the question of the legality of the search and seizure was mooted.* The only issue raised by the introduction of evidence relating to the deposit box is whether it so prejudiced petitioner as to require a reversal of his conviction even though it was withdrawn from the consideration of the jury.

The majority of the Court of Appeals was correct, we submit, in holding that any error in admitting the testimony in question was cured by the trial court when it "promptly admonished the jury to disregard the testimony which was stricken and also gave adequate instructions with reference thereto." Since the trial court's instructions were clear and there were no circumstances present which would lead one to believe that the jury would not follow them, the law presumes that the jury did follow them in arriving at their verdict. *Delli Paoli* v. *United States*, 352 U. S. 232, 242; *Opper* v. *United States*, 348 U. S. 84, 95. See also *Lutwak* v. *United States*, 344 U. S. 604,

* In any event, there is no merit to petitioner's contention that the search warrant was unlawfully issued because there was no probable cause. The affidavit in support of the application for the warrant affirmatively represented that the bank had been robbed several months before, that petitioner had been identified as possessing and passing currency stolen from that bank, and that petitioner, under an assumed name, had recently rented a certain safety deposit box. In addition to these facts, the affidavit contained the hearsay statement that proceeds from the robbery were in that box. Petitioner contends that the latter statement could not be considered in determining probable cause because a search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury. This is not the law. *Brinegar* v. *United States*, 338 U. S. 160, 175–176. While the anonymous "tip" alone might not be sufficient, it together with the other established facts did show probable cause for search of the box.

615–620; *Blumenthal* v. *United States*, 332 U. S. 539, 553. As the Court of Appeals pointed out (Pet. App. 6a):

> Some of the testimony which defendant says was prejudicial although later stricken, was testimony to which he stipulated. * * * No request by defendant to admonish the jury was denied during the trial. No requested instruction to disregard portions of the testimony was denied. We hold there was no error in this respect.

The court further noted that there was other substantial evidence to support the conviction, specifically the evidence relating to the heel print and the $2.00 bills, concluding: "The volume of evidence in this case may not be great, but its quality is high" (Pet. App. 7a–8a).[1]

The dissenting judge, in concluding that the evidence relating to the bank box was prejudicial despite the clear instructions of the court, apparently assumed, on the basis of the ruling of the trial judge, that the evidence was, in fact, incompetent and irrelevant. Actually, although there was no positive proof that the marked money found in petitioner's box was stolen from the bank, the circumstances were such that the evidence was relevant and competent. The bank teller positively and unwaveringly maintained that she had marked the four $50 bills in the bank. The witness never testified on direct examination as to when she had marked them and the only

[1] This holding answers petitioner's present challenge to the sufficiency of the evidence (Pet. 12).

discrepancy in her testimony was that she stated, on direct examination, that she had seen the bills on the date of the robbery and then admitted, on cross examination, that she was not sure she had seen them on that day. That plus the fact that the $10 bills were in sequence was a circumstance which justified an inference that the bills came from the bank. The trial judge was therefore more favorable to the defense than necessary in characterizing the testimony as "unsatisfactory" and excluding it from the consideration of the jury.

2. Petitioner admits that the fruits or means of a crime may be seized incidental to a lawful arrest, but he contends, as he contended below, that the shoes seized incidental to his arrest should have been suppressed since they could not be considered a means used to commit the robbery.

As aptly stated by the Court of Appeals (Pet. App. 4a):

> Defendant argues that articles are not "the means" of committing an offense merely because they have been used in the commission of an offense. If, during a robbery, a robber had a gun in his hand, and wore a mask and gloves, the latter to prevent finger prints, defendant, apparently, would concede that such articles could be seized in a search incidental to a lawful arrest. However, defendant insists that shoes worn during a robbery do not come within that category.
>
> It is not logical to place in different categories a mask and a hat which might have been worn and pulled down upon the face of

> the robber to make identification more difficult. It is likewise difficult to place in different categories a pair of gloves worn on the hands and a pair of shoes worn on the feet. Surely, the latter would facilitate a robber's get-away and would not attract as much public attention as a robber fleeing barefooted from the scene of the hold-up.

Other case law establishes the cogency of this conclusion. This Court, for example, in *Marron* v. *United States,* 275 U. S. 192, 199, upheld the seizure, incidental to an arrest, of ledgers and utility bills of a saloon, stating "* * * if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense." See also *Morton* v. *United States,* 147 F. 2d 28 (C. A. D. C.), certiorari denied, 324 U. S. 875, a murder case in which the court approved the admission into evidence of a blood-stained shirt and trousers found in the defendant's closet and seized incidental to his arrest. Cf. *United States* v. *Rabinowitz,* 339 U. S. 56, 61–62.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958